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APPENDIX

UNITED STATES OF AMERICA

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

ERIE RESISTOR CORPORATION

and

**INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, LOCAL 613,**

AFL-CIO

**Case No.
6-CA-1790**

Relevant Docket Entries

- 7.21.59 Charge filed.**
- 7.23.59 First amended charge filed.**
- 9.11.59 Second amended charge filed.**
- 4. 1.60 Third amended charge filed.**
- 4. 7.60 Complaint and notice of hearing dated.**
- 4.12.60 Company's¹ letter requesting extension of time to file answer and request for rescheduling of hearing, dated.**
- 4.19.60 Regional Director's order rescheduling hearing, dated.**
- 4.19.60 Regional Director's order extending time for filing answer, dated.**
- 4.28.60 Company's answer to the complaint, received.**

¹. Erie Resistor Corporation, Respondent in the proceeding before the Board and Petitioner herein.

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Relevant Docket Entries.

- 5. 5.60 Regional Director's teletype rescheduling hearing, dated.
 - 5.23.60 Hearing opened.
 - 5.26.60 Hearing closed.
 - 7.21.60 Company's requests for findings of fact and conclusions of law, dated.
 - 10.18.60 Trial Examiner Hilton's Intermediate Report, dated.
 - 12.13.60 General Counsel's exceptions to the Intermediate Report, received.
 - 12.13.60 Union's exceptions and request to argue orally before the Board, received.
 - 12.19.60 Errata to Union's exception, received.
 - 4. 7.61 Notice of hearing issued.
 - 4.12.61 Order amending Notice of Hearing, issued.
 - 5. 4.61 Oral argument appearance sheet, dated.
 - 7.31.61 Decision and Order issued.
 - 8. 7.61 Order correcting Decision and Order.
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*Decision and Order.***Decision and Order**

On October 18, 1960, Trial Examiner Reeves R. Hilton issued his Intermediate Report in the above-entitled proceeding, finding that Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel and the Charging Party, International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO, herein called the Union, filed exceptions to the Intermediate Report, together with supporting briefs. Respondent filed a brief in support of the Intermediate Report. On May 4, 1961, the Board heard oral argument in Washington, D. C., in which all parties appeared and participated.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, the oral argument, and the entire record in the case, and finds merit in the exceptions of the General Counsel and the Charging Party. Accordingly, the Board adopts the findings of the Trial Examiner only to the extent they are consistent with the decision herein.

The essential facts of the case are not in dispute. The Union, which had been certified in 1951 as representative of Respondent's production and maintenance employees, called a strike on March 31, 1959. The strike was concededly economic in its inception, the parties having been unable to come to terms on a new agreement.

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All employees working in the bargaining unit, numbering approximately 478, joined the strike.

New applications for employment were received by Respondent within a week or two after the strike began. However, during April, Respondent operated the plant as best it could with 140 clerical and other non-unit employees performing production jobs. Production reached about 15 to 30 per cent of normal. Several customers cancelled their orders with Respondent.

On May 3, Respondent decided to seek replacements to run the plant, and so informed all members of the Union, by letter. Strikers were told they would have their jobs only until replaced. The first replacements were hired the week of May 11. After being accepted for employment, these replacements were told by Respondent they would not lose their jobs as a result of the strike. Similar assurances were given by Respondent's division managers in meetings with replacements inside the plant.

During this period the parties continued negotiations for a new agreement. In a bargaining session held May 11, Respondent informed the Union that it was promising replacements they would not be laid off as a result of the settlement of the strike, and advised it that in order to implement this promise, it would have to accord the replacements some form of superseniority. Respondent offered to negotiate the details of a superseniority scheme for the replacements. The Union replied that superseniority was discriminatory and illegal, and refused to consider it.

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Five bargaining sessions were held between May 11 and May 28, during which Respondent proposed several alternative forms of superseniority. The Union, however, remained adamant in its opposition to superseniority, contending that all strikers would have to be reinstated and the replacements terminated. Because of certain picket line incidents which had occurred on April 2 and May 7, Respondent proposed to delete the union security clause which had been contained in the prior contract, suggesting that, because of the Union's harassment of replacements, employees should no longer be required to join the Union.

By May 25, 33 replacements were working, plus 4 former strikers.¹ On May 27, Respondent decided that enough replacements had been hired so that its proposed superseniority plan should be made more definite. A plan calling for 20 years additional seniority for employees in the unit who worked during the strike was devised by Respondent's Director of Industrial Relations, Gordon Ferrell. This plan was to apply only in the event of future layoffs, and the 20 years thereby accorded replacements and ex-strikers could not be used for purposes of vacations, bumping, and other employee benefits based on years of service with the Employer.²

1. The 140 clerical and other non-unit employees continued to work at unit jobs throughout the strike, supplementing the replacements and returned strikers.

2. According to Ferrell, the figure of 20 years was developed from a projection of what Respondent's work force would be following the strike, on the basis of expected orders. Apparently, Respondent was concerned with the impact of future layoffs on the replacements. At the time of the strike, in addition to the 478 employees in the bargaining unit, there were about 450 other employees on lay-off. As of March 31, the beginning of the strike, a male employee needed 7 years seniority to avoid lay-off; a female employee needed 9 years.

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On May 28, Respondent informed the Union that it had settled on the 20 year superseniority plan. However, this plan was not publicized by Respondent until June 10, and was claimed to be "confidential" until then.

At a Union meeting held May 29, the strikers unanimously resolved to continue striking "until management stops its unfair labor practice by making us agree to giving superseniority to the scabs." That weekend, May 30 and 31, the Union publicized Respondent's 20 year superseniority plan over the local television station.

As the strike progressed, the Respondent continued to receive applications from prospective replacements.³ Over 300 applications were received which were not processed—according to one Company official, because he did not want to "break" the Union. Industrial Relations Director Ferrell testified that the Company "purposely proceeded slowly in its replacement program so as to preserve, if possible, a continuity of employment."

During the week beginning June 4, agreement was reached on several seniority provisions which had hitherto been in dispute. Superseniority, however, remained in issue, and on June 10, Respondent wrote a letter to all employees and members of the Union, making public for the first time its superseniority plan. On June 11, the Union offered to give up its union security agreement if the Company would abandon superseniority. No agreement was reached, however, and the Union stated it would continue striking until Respondent yielded on superseniority.

3. Throughout this period, the City of Erie was classified by the United States Department of Labor as an "F" area, the designation indicative of the greatest relative labor surplus (at least 12 per cent unemployed).

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By June 14, 81 replacements had accepted employment, plus 23 returning strikers. On June 15, Respondent posted on the Company bulletin board its 20 year superseniority plan. In the week following June 15, 21 more replacements accepted employment, plus 64 additional strikers — a total of 102 replacements and 87 former strikers. On June 24, the Union decided it had to settle the strike, and offered to withdraw the picket line and submit the superseniority issue to the Board. The parties at that time drew up a tentative agreement with respect to the remaining economic issues. Although the Respondent informed the Union on the evening of June 24 that it was not able to accept the terms of the tentative agreement, the strike nonetheless came to an end on June 25.

The next day, Respondent gave the Union a list of 129 employees whose jobs had been filled by replacements. Thereafter, strikers who had not been replaced were recalled by Respondent in the order of seniority, with several exceptions for critical jobs. By July 5, there were 358 employees working in the bargaining unit. Respondent's work force increased to a maximum of 442 by September 20, 1959, then, for economic reasons, decreased gradually to 240 by May 1, 1960. It is conceded that a large number of employees laid off between September 1959 and May 1960 were recalled strikers whose seniority became insufficient solely because of the operation of Respondent's superseniority plan.

On July 17, 1959, the parties executed a strike settlement agreement, wherein they agreed to settle Respondent's "replacement and job assurance" policy through the Board and the federal courts. The existing

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plan was to "remain in effect pending final disposition." Also on this date, the parties executed a new contract, including among other things a maintenance of membership provision.

The principal issue in this case is the legality of Respondent's superseniority plan. The complaint alleges, and the General Counsel and Charging Party contend, that Respondent's insistence on, and institution of, its 20 year superseniority plan for returning strikers and strike replacements, was in violation of Sections 8(a) (1), (3) and (5) of the Act.

The Trial Examiner dismissed the complaint. Finding that the Board's past decisions on superseniority had considered motivation as the controlling factor in determining the legality of strike superseniority, the Trial Examiner held the evidence inadequate to support a finding that Respondent had adopted its superseniority plan to discriminate against the Union. He therefore found no violation of the Act.

We do not agree with the Trial Examiner's interpretation of the Board's past decisions regarding superseniority. The Board has never found the grant of superseniority to returning strikers or strike replacements lawful. As early as 1940, the Board indicated that an employer could not, in addition to replacing strikers, deprive strikers of their seniority for not reporting to work during a strike.⁴ Similarly, in *General Electric Co.*⁵ the Board found unlawful an employer's tolling of

⁴ 4. *Påpér, Calmenson and Co.*, 26 NLRB 553, 557. See also *Precision Castings Co.*, 48 NLRB 870.

5. 80 NLRB 510.

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strikers' seniority during their strike, while not tolling the seniority of nonstrikers. The Board observed that relative seniority is one of the factors upon which individual employees' tenure of employment depends, and stated that, "except to the extent that a striker may be replaced during an economic strike, his employment relationship cannot otherwise be severed or impaired because of his strike activity."⁶

The Board has considered the legality of superseniority in four cases since *General Electric*. In *Potlatch Forests, Inc.*,⁷ an employer during an economic strike proposed that replacements be given special protection when the strike was over. Thereafter, it accorded superseniority to all those who had worked during the strike, placing them above those who had remained on strike. Several strikers reinstated after the strike were laid off in conformity with this plan. The Board adopted the Trial Examiner's finding that the employer's superseniority policy was discriminatory and in violation of Section 8(a) (3) of the Act. The Ninth Circuit, in an opinion discussed hereinafter, denied enforcement of the Board's order.⁸

In the three superseniority cases which followed *Potlatch*, independent evidence of the employers' discriminatory intent appeared in the record. In the *California Date Growers Assn.*⁹ and *Ballas Egg Products*¹⁰

6. *Id.* at 513.

7. 87 NLRB 1193.

8. *N.L.R.B. v. Potlatch Forests, Inc.*, 189 F. 2d 82.

9. 118 NLRB 246, enf'd 259 F. 2d 587 (C.A. 9).

10. 125 NLRB 342, enf'd 283 F. 2d 871 (C.A. 6).

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cases, the respondents had committed other unfair labor practices while granting superseniority. In *Olin Mathieson Chemical Corp.*,¹¹ the employer promulgated its superseniority policy after the strike ended, thereby making it plain that its sole intention was to favor non-strikers over strikers. In each of these cases the Board found violations of the Act without relying on its *Potlatch* decision, but in each case the Board disclaimed any intention of passing upon the rationale of the *Potlatch* case, that superseniority however motivated was an illegal discrimination against strikers. The Board's unfair labor practice findings were in all three cases sustained by the courts on appeal.¹²

The decision of the Ninth Circuit in *Potlatch*, *supra*, thus stands as the only decision, Board or Court, finding lawful an employer's use of superseniority.¹³ In so finding, the Ninth Circuit, though recognizing that the grant of superseniority during a strike was a form of discrimination which tended to discourage union activities, concluded nonetheless that it was a legitimate corollary of an employer's right under the *Mackay Radio* decision¹⁴ to secure permanent replacements. In *Mackay*, the Supreme Court held that an employer could lawfully hire replacements during an economic strike in order to continue his business, and need not, at the strike's end, dis-

11. 114 NLRB 486, enf'd 232 F. 2d 158 (C.A. 4), affirmed 352 U.S. 1020.

12. *Supra*.

13. Cf. *N.L.R.B. v. Lewin-Mathes Co.*, 285 F. 2d 329 (C.A. 7), pet. for mod. den. January 19, 1961, in which the Seventh Circuit indicated that an employer's use of superseniority during an economic strike would be lawful, even though the Board's decision in that case had not passed on that issue, nor had the complaint alleged superseniority as a separate unfair labor practice.

14. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333.

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charge these replacements in order to reinstate returning strikers. We respectfully disagree with the Ninth Circuit's aforementioned view with respect to *Mackay* and superseniority.¹⁵ In our opinion, superseniority is a form of discrimination extending far beyond the employer's right of replacement sanctioned by *Mackay*, and is, moreover, in direct conflict with the express provisions of the Act prohibiting discrimination.

Perhaps most obvious is the distinction that permanent replacement affects only those who are, in actuality, replaced, while superseniority for replacements affects the employment tenure of all strikers, whether or not replaced. It is one thing to say that a striker is subject to replacement, and therefore loss of his job at the strike's end; quite another to say that, in addition to the threat of replacement, and regardless of the employer's success in securing a replacement for the individual striker, all strikers will at best return to their jobs with inferior seniority, thus incurring a detriment to their job security forever. Clearly, this is a discrimination in addition to the threat of replacement, and not merely a lesser form of discrimination encompassed by it.

Mackay permits an employer to take certain action in order to carry on his business during an economic strike. It is obvious that, in some instances, an employer may more readily secure replacements if he can offer them superseniority. But we also believe that *Mackay* contemplated a situation whereby, at the strike's end,

15. A number of law review notes have commented critically on the Ninth Circuit's *Potlatch* decision. See, e.g., 27 U. Chi. L. Rev. 368 (1960); 6 Duke B. J. 143 (1957); 42 Va. L. Rev. 836 (1956); 30 Texas L. Rev. 776 (1952); 6 Rutgers L. Rev. 470 (1952); 9 Wash. & Lee L. Rev. 115 (1952); 4 Stan. L. Rev. 151 (1951).

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strikers who were not replaced could return to their jobs with no impairment of their tenure because they chose to go on strike. It is expressly provided in the Act, and not here disputed, that strikers retain their employee status during a strike.¹⁶ *Mackay* itself holds that, as "employees," strikers may not be discriminated against in the manner of, and the terms of, their reinstatement.¹⁷ Yet, giving 20 years or any other special seniority to strike replacements necessarily deprives unreplaced strikers of an important aspect of their pre-strike status, for seniority is by its nature relative; giving to one necessarily takes away from another. In essence, therefore, an award of superseniority to strike replacements renders one important requirement of *Mackay*—non-discriminatory and complete reinstatement of unreplaced strikers—an actual impossibility.

Further, permitting an employer to grant superseniority to all who work during a strike greatly enlarges the definition of "replacement" as envisaged by *Mackay*. Under the Supreme Court's *Mackay* decision, an employer during an economic strike is permitted to secure new employees, or employees outside the bargaining unit, to work permanently at unit jobs. But superseniority is normally offered not only to new employees—if to them at all¹⁸—but to the bargaining unit employees them-

16. Section 2(3) includes in the definition of employee "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute. . . ."

17. *Supra*, at p. 345. See also *Robinson Freight Lines*, 114 NLRB 1093, 1096, enf'd 251 F. 2d 639, 642 (C.A. 6); *Indiana Desk Co.*, 56 NLRB 76, 78-79, enf'd as mod. 149 F. 2d 987 (C.A. 7).

18. In some cases, as in *Olin Mathieson Chemical Corp.*, *supra*, superseniority was offered only to returning strikers. In none of the cases heretofore considered by the Board has superseniority been offered only to new employees.

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selves, if they abandon the strike, or choose not to join it. Naturally, superseniority must be offered to the strikers on an individual basis, since extra seniority for all is real seniority for none. From this point of view, an offer of superseniority is not merely an attempt to secure new "replacements," but more accurately an offer of benefit to individual strikers to abandon the strike and return to work. In other contexts, the Board and Courts have held such an offer of benefit to individual strikers to be an independent violation of Section 8 (a) (1).¹⁹

The discrimination effected by superseniority lasts indefinitely. The Respondent in the present case contends that it was concerned with assuring replacements and nonstrikers of "permanence." Yet, by this, the employer admits it meant not just the right to the job of a replaced striker at the strike's end, but much more, the job plus a 20 year seniority cushion available in the event of future economic declines and layoffs.²⁰ We do not think the "permanence" envisaged by the Supreme Court in *Mackay* encompassed this "concern" of the employer, despite the contrary opinion of the Ninth Circuit in *Potlatch*. Whether a replacement can have the job of a

19. See, e.g., *Marlboro Electronic Parts Corp.*, 127 NLRB 122, 132; *Trinity Valley Iron and Steel Co.*, 127 NLRB 417, 424, enf'd 290 F.2d 47 (C.A. 5). See also *N.L.R.B. v. Spiewak, et al.*, 179 F. 2d 695, 696-7 (C.A. 3).

20. Director of Industrial Relations Ferrell testified that "We knew because of the number of people on lay off and in light of the business which we had estimated, projected, that this was going to require some sort of seniority, additional seniority, which would give these people that job assurance which we felt we had the right to offer them, as permanent replacements. Otherwise, they wouldn't be permanent."

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striker is one question, settled in *Mackay*,²¹ but the effect of future economic declines and layoffs is a separate question, affecting not only replacements, but all employees alike. We are confident the Supreme Court in *Mackay* did not intend to permit preferred treatment of nonstrikers and replacements long after the strike was over.

There are two other aspects of superseniority which distinguish it from the mere right of replacement granted in *Mackay*, and which portend ill for the collective bargaining process and the right to strike, both protected by Sections 7 and 13 of the Act.

First, whereas the threat of replacement by outsiders may solidify the strikers in their collective efforts, superseniority effectively divides the strikers against themselves. All employees formerly on layoff, and younger strikers with low seniority, immediately see their chance-of-a-lifetime to gain at one stroke the security which only long years of employment could theretofore give them; employees longer in the employer's service sense the threat, and are impelled to return to work to protect their seniority. This combination of threat and promise, inherent in grants of seniority not based on actual service, could appear close to irresistible, and places strong pressure on the strikers, their mutual

21. Respondent contends, *inter alia*, that it had to offer superseniority merely to assure replacements of jobs at the strike's end, since the Union was taking the bargaining position that all replacements must be discharged at the strike's end. Respondent's argument is a *non sequitur*, for superseniority has no bearing whatever on whether the employer abides by its right under *Mackay* to retain replacements at the strike's end, or, on the other hand, accedes to the Union's legitimate bargaining request, understandably common to all striking unions, that the strikers should be recalled to their jobs.

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interest overwhelmed by fear and desire, to abandon the strike.

The present case illustrates the point. At the inception of the strike, all 478 employees in the bargaining unit honored the picket line or joined in strike activities. As the strike progressed, Respondent secured a gradually increasing number of new employees as replacements, but few strikers returned to work until Respondent's offer of superseniority was publicly announced. During the weekend of May 30 and 31, the Union publicized Respondent's 20 year superseniority policy over the local television station.²² On June 10, the plan was announced by Respondent in a letter to all employees and Union members; on June 15, Respondent posted it on the Company bulletin board. During the week ending June 7, the total number of strikers who abandoned the strike rose from 5 to 8. By June 14, the total had jumped to 23, and in the week ending June 21, it jumped over 200 per cent to 87. The number increased to 125 during the week commencing June 28.²³ At this point, the Union found it impossible to continue the strike, and decided it had to settle. The strike ended June 25.

The second point is that superseniority renders future bargaining difficult, if not impossible, for the authorized collective bargaining representative. Unlike the

22. Prior to this, the superseniority plan was considered "confidential" by Respondent, and had merely been discussed between the parties in bargaining. On May 27, Respondent told the Union it had settled on the 20 year plan.

23. In addition, 57 new employees had been hired as replacements, and 70 employees formerly on layoff had returned. Thus the number of strikers induced to abandon the strike greatly exceeded the number of new employees hired as replacements, and was also greater than the number of laid off employees induced to return to work.

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right of replacement granted under *Mackay*, which ceases to be an issue once the employer decides to retain all replacements at the strike's end, superseniority is a continual irritant to the employees and to the Union. Employees are henceforth set apart into two groups: those who stayed with the Union to the end and lost their seniority, and those who returned before the end of the strike and thereby gained extra seniority. This difference is reemphasized with each subsequent layoff, for those who supported the union most faithfully are likely to be the first laid off. It is doubtful whether the Union can ever again succeed in calling, or even threatening, a strike, for those with 20 years superseniority will be fearful that this time replacements may, perhaps, be granted 40 years superseniority. Those who were lucky enough not to be replaced during the first strike will prefer to remain at work, and regain the seniority so abruptly lost during the first strike. The effective reward of nonstrikers and punishment of strikers inherent in superseniority stands as an ever-present reminder of the dangers connected with striking, and with union activities in general.

In the present case, at the end of the strike, the Union received approximately 190 withdrawal cards from former members. In the course of economic layoffs which followed, approximately 132 strikers who had not been replaced, and who had been recalled, were among the first to lose their jobs solely as a result of the superseniority plan. It is hard to conceive of continued effective collective bargaining under these circumstances.

In view of the immediate consequences to employees' tenure which follow from a grant of superseniority, we

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do not believe that specific evidence of Respondent's discriminatory motivation is required to establish the alleged violations of the Act.

In the *Radio Officers' case*,²⁴ the Supreme Court pointed out that, in some situations, "specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of §8 (a) (3)." This is merely a corollary of the common-law rule that a person is held to intend the foreseeable consequences of his conduct, and the result is, in the words of the Supreme Court, that "proof of certain types of discrimination satisfies the intent requirement."²⁵

One of the situations specifically considered by the Supreme Court in *Radio Officers'* (Gaynor) involved disparate wage treatment of employees solely on the basis of their union membership and status. The Supreme Court upheld the Second Circuit's finding that this form of discrimination was "inherently conducive to increased union membership," and, since the consequences were so plainly foreseeable, no further proof of "intent" was necessary.²⁶

24. *The Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17.

25. *Id.* at pp. 44-45.

26. See also the Supreme Court's decision in *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 795, where the Supreme Court upheld the Board's 8(a)(1) and (3) findings with respect to the discharges of three stewards wearing union buttons, even though the discharges "were found not to be motivated by opposition to the particular union or we deduce, to unionism." And see *N.L.R.B. v. Beth E. Richards, et al.*, 265 F. 2d 855, 860 (C.A. 3), where the Court, in discussing an employer's criteria for layoffs, reiterated the rationale of *Radio Officers'*, *supra*, and observed: "It is possible that the criterion adopted, though alone reasonable enough, may have the foreseeable result of affecting union activity, in which case the employer commits an unfair labor practice."

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In our opinion, the present case is in every essential respect like *Gaynor, supra*. The right to strike is a privilege guaranteed to employees by statute, and Respondent's super seniority policy—on its face discriminatory against those who continued to strike—clearly discouraged strike activities and union membership of employees. Such was the inevitable result of a preference granted for all time to those who did not join the Unions strike activities. Where discrimination is so patent, and its consequences so inescapable and demonstrable, we do not think the General Counsel need prove that Respondent subjectively "intended" such a result.²⁷

Nor do we believe that Respondent's claim of "necessity" can be a defense to the type of conduct here found unlawful. Surely every employer faced with a strike, or any other form of union activity, will be first concerned with the well-being of his business. There is, moreover, no doubt that a strike may increase the intensity of this concern, for the primary purpose of most strikes is to apply economic pressure to strengthen the union's bargaining demands.²⁸ But we do not believe that the effectiveness of a strike, or the difficulty an em-

27. The Supreme Court's recent decision in *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 365 U.S. 667, does not in our opinion require a different conclusion, but rather supports the conclusion here reached. In *Local 357, supra*, the Supreme Court reiterated its earlier position in *Radiogram Officers* that "some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference . . ." (*Id.* at p. 675). The Court in *Local 357* refused to infer discrimination from an exclusive hiring agreement which expressly provided that there should be no such discrimination.

28. See, e.g., *American Brake Shoe Co.*, 116 NLRB 820, 831, enf. den. 244 F.2d 489 (C.A. 7).

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ployer may have in securing replacements,²⁹ can sanction the pervasive form of preferred treatment here utilized by the Employer.³⁰ To excuse such conduct would greatly diminish, if not destroy, the right to strike guaranteed by the Act, and would run directly counter to the guarantees of Sections 8(a)(1) and (3) that employees shall not be discriminated against for engaging in protected concerted activities.

We find, in conclusion, that Respondent's grant of superseniority during the course of the Union's strike was in violation of Sections 8(a)(1) and (3) of the Act, and that Respondent's subsequent layoff of a large number of recalled strikers pursuant to such plan was likewise violative of these sections.³¹

As we have found, above, that superseniority was an unlawful form of discrimination, we find, in accordance

29. In view of our finding herein, that necessity is not a defense to the type of conduct engaged in by Respondent, we do not pass upon Respondent's contention that, in the circumstances of this case, it was in fact necessary to offer superseniority in order to procure strike replacements.

Also, in view of our decision herein, we do not pass upon the question of whether the Respondent had an express discriminatory intent in instituting its superseniority plan. See *California Date Growers Assn.* and *Ballas Egg Products, supra*, footnotes 9 and 10.

30. In other contexts, the Board and Courts have held that an employer's economic concern does not justify conduct otherwise violative of the Act. See, e.g., *N.L.R.B. v. Hudson Motor Car Co.*, 128 F. 2d 528, 532-33 (C.A. 6) and *N.L.R.B. v. Gluek Brewing Co.*, 144 F. 2d 847, 853-54 (C.A. 8), cited with apparent approval in *Cusano d/b/a American Shuffleboard v. N.L.R.B.*, 190 F. 2d 898, 903, fn. 7 (C.A. 3). See also *Star Publishing Co.*, 4 NLRB 498, 505, enf'd 97 F. 2d 465, 712 (C.A. 9); *Allis-Chalmers Mfg. Co. v. N.L.R.B.*, 162 F. 2d 435, 440 (C.A. 7).

31. We do not agree with Respondent's contention that the Union in its strike settlement agreement of July 17 waived all rights for these employees. The settlement agreement provided, *inter alia*: "The Company's replacement and job assurance policy to be resolved by the NLRB and the Federal Courts and to remain in effect pending final disposition." It is clear that this agreement was intended merely as an interim settle-

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with the Supreme Court's decision in *Borg-Warner*,³² that Respondent's continued insistence on this or a similar proposal, as a condition of negotiating an agreement with the Union, constituted a violation of Section 8(a) (5), as alleged in the complaint.³³

Having found that Respondent unlawfully insisted on, and adopted, its superseniority plan during the course of the Union's strike, we find the evidence supports the General Counsel's and the Charging Party's position that Respondent's unfair labor practices prolonged the strike, thereby converting it to an unfair labor practice strike.

The strike at its inception was economic in nature, with five contractual issues outstanding. However, on

ment pending legal determination of the employees' rights. In any event, we would not in our discretion honor a private settlement which purported to deny to employees the rights guaranteed them by the Act. Cf. *Wooster Division of Borg-Warner Corp.*, 121 NLRB 1492, 1495.

32. *N.L.R.B. v. Wooster Div. of Borg-Warner*, 356 U.S. 342. Cf. *Olin Mathieson, supra* (114 NLRB at p 488.)

33. The complaint also alleges that Respondent refused to bargain by engaging in dilatory tactics and shifting positions, by giving the Union insufficient time to consider proposals, and by failing to give the Union requested information as to the names of replaced strikers. With respect to the former allegations, we find the evidence insufficient to establish that Respondent's "change of positions" and "one-day offers" were anything other than bona fide strategic maneuvers on the part of Respondent, and we find nothing unlawful in Respondent's tactics. See, e.g., *R. J. Oil & Refining Co., Inc.*, 108 NLRB 641, 643; *Solar Aircraft Co.*, 109 NLRB 130, 133. With respect to Respondent's failure to supply the Union with the names of the replaced strikers, the record indicates that on June 26, Respondent did furnish the Union with the requested information. As Respondent has already supplied this information, and as we have found that Respondent unlawfully refused to bargain on other grounds, we do not believe any useful purpose would be served by predicated a finding of a refusal to bargain on this additional ground. See *The Jacobs Manufacturing Co.*, 94 NLRB 1214, 1226, enf'd 196 F. 2d 680 (C.A. 2).

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May 11, Respondent introduced the subject of superseniority into the discussions, stating that it could sign no contract without some form of superseniority. Superseniority soon became the dominant issue in the settlement of the strike. At informal "side-bar" conferences held May 14 and 15, the parties discussed the remaining issues aside from superseniority, and agreement seemed imminent. Union negotiator Colleila went so far as to tell Respondent that "if they dropped the superseniority issue, we had a complete agreement." However, Respondent at the meeting on May 18 reiterated its position that superseniority was "something that management people want and we must have." The Union would not agree to superseniority, and the parties recessed for several days.

When Respondent settled on the 20 year plan on May 28, the Union held a meeting on May 29, and unanimously resolved to continue striking "until management stops its unfair labor practice by making us agree to giving superseniority to the scabs." Similar statements were made by Union negotiators on June 11 and 23. At one point, Union representative Copeland asked, "If we are willing to tear up the entire contract and give it back to you and start from scratch, would you then be willing to move off the superseniority?" Respondent refused.

It is well settled that an economic strike is converted to an unfair labor practice strike when an employer's unfair labor practices operate to aggravate, or prolong, the strike.³⁴ In the present case, it is clear that by May 29, the date of the Union's resolution to continue striking

³⁴. *Kohler Co.*, 128 NLRB No. 122, pp. 28-29; *Combined Metal Mfg. Co.*, 123 NLRB 895, 897; *J. H. Rutter-Rex Mfg. Co., Inc.*, 115 NLRB 380, 390, enf'd 245 F. 2d 594 (C.A. 5).

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over superseniority, Respondent's superseniority policy had served to aggravate and prolong the strike, despite a narrowing of the parties' disagreement on other issues. We find, therefore, that the Union's strike, economic in its inception, was on May 29, converted to an unfair labor practice strike by the Respondent's unfair labor practices, found above. It follows that all strikers not replaced as of that date were, under established law, entitled to reinstatement as of the date of their unconditional abandonment of the strike.³⁵ We find this date to have been June 25, 1959, when the Union notified the Respondent by telegram that the strike was terminated, and that the strikers were "ready willing and able" to return to work.³⁶ As Respondent failed on June 25 to fulfill its obligation to reinstate the unfair labor practice strikers, we find that it thereby committed an additional violation of Sections 8(a)(1) and (3) of the Act, as alleged in the complaint.

35. See, e.g., *N.L.R.B. v. Pecheur Lozenje Co.*, 209 F. 2d 393, 404-5 (C.A. 2), cert. den. 347 U.S. 953.

36. We find no merit in Respondent's contention that the Union's offer of June 25 was conditional. Although the Union did state that the striking employees "desire [d] reinstatement in line with their seniority as per the agreement reached with your representatives," there was some question at the time as to the exact terms of the strike settlement. Respondent answered the Union's telegram the same day with its own telegram, "welcoming" the Union's decision to "terminate" the strike. Respondent made clear its understanding that the agreement referred to in the Union's wire was simply that Respondent would furnish a list of strikers who had been replaced, and would call back to work those eligible for jobs. A return telegram from the Union did not dispute this interpretation. Thus, both parties treated the Union's telegram as an unconditional offer to return to work, and the strikers who were recalled did so return. Moreover, Respondent in a note handed to the Union on June 26 stated: "The Company received notice of your termination of the strike at 3:30 P.M., June 25th, and considers that hour as the end of the strike." (G.C. Exhibit No. 11)

*Decision and Order.**The Remedy*

Having found that the Respondent has violated the Act, we shall order that it cease and desist therefrom, and take certain affirmative action in order to effectuate the policies of the Act.

As we have found Respondent's 20 year superseniority policy to have been discriminatory and in violation of the Act, we shall order the Respondent to forthwith rescind said policy, and to restore all strikers who sought reinstatement on June 25, 1959, to the seniority they would have enjoyed absent the discriminatory policy.

We have also found that the strike, which began as an economic strike on March 31, 1959, was converted into an unfair labor practice strike on May 29, 1959, and that Respondent's refusal to reemploy the strikers on June 25, 1959, when they unconditionally applied for reinstatement, was discriminatory and violative of Sections 8(a)(1) and (3) of the Act. We shall therefore order the Respondent, insofar as it has not already done so, to offer to those employees who went on strike on March 31, 1959, and who were not replaced prior to May 29, 1959, immediate and full reinstatement to their former or substantially equivalent positions, dismissing, if necessary, any employees hired since May 29, 1959, to replace them.³⁷ If, after such dismissal, there are not enough positions remaining for all these employees, the available positions shall be distributed among them, without discrimination because of their union member-

37. See *N.L.R.B. v. Pecheur Lozenge Co.*, *supra*, and cases cited therein. The exact names of the discriminatees, as to whose identity there appears to be no dispute, shall be left to the compliance stage of the proceeding.

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ship, activity, or participation in the strike, following such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of Respondent's business. Those strikers for whom no employment is immediately available after such distribution shall be placed upon a preferential hiring list, and they shall thereafter, in accordance with such list, be offered reinstatement as positions become available, and before other persons are hired for such work. Reinstatement, as provided herein, shall be without prejudice to the employees' seniority or other rights and privileges.

We shall also order the Respondent to reimburse these employees for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages during the periods (a) from June 25, 1959, the date of the Respondent's refusal to reinstate them upon their unconditional application, to the date of the Intermediate Report herein, and (b) from the date of this Decision and Order to the date of the Respondent's offer of reinstatement,³⁸ or placement on a preferential hiring list in the manner hereinabove described, less his net earnings during said periods. Such loss of pay shall be computed on the basis of separate calendar quarters, in accordance with the policy enunciated in the *Woolworth case*.³⁹

We have further found that Respondent discriminated against certain strikers who were recalled, by

38. When, as here, the Board, contrary to the Trial Examiner, orders reinstatement of employees, back pay is abated from the date of the Intermediate Report to the date of the Board's Decision and Order.

39. *F. W. Woolworth Co.*, 90 NLRB 289.

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laying them off solely as a result of the operation of the Respondent's 20 year superseniority plan. We shall order that Respondent offer reinstatement to all such strikers who would not otherwise have been laid off, on the basis of their restored seniority, dismissing if necessary employees hired since May 29 who were retained solely because of the operation of the 20 year superseniority plan. We shall also order that Respondent make whole all discriminatorily laid off strikers for any loss of pay they may have suffered as the result of Respondent's superseniority policy. The amount of back pay thus due shall be computed in accordance with the Board's normal back pay policies, as set forth above.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Erie Resistor Corporation, Erie, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining or giving effect to its 20 year superseniority policy, or to any other seniority or layoff policy which discriminates against any of its employees with regard to the order in which they are to be selected for layoff, or with regard to any other aspect of their employment relationship, on the basis of whether they had or had not engaged in strike or concerted activities, or whether they had or had not worked during a strike;

(b) Discouraging membership in International Union of Electrical Radio and Machine Workers, Local

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613, AFL-CIO, or in any other labor organization of its employees, by refusing them reinstatement upon their unconditional abandonment of their unfair labor practice strike, or by laying them off solely as a result of the operation of a discriminatory superseniority policy, or otherwise discriminating against them in regard to their hire or tenure of employment or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act, as amended.

(c) Refusing to bargain collectively with the aforementioned labor organization, as exclusive bargaining representative of employees in the appropriate unit, by insisting that the Union agree to a discriminatory strike superseniority plan.

The appropriate bargaining unit is:

All production and maintenance employees at Respondent's Erie, Pennsylvania plants, excluding clerical employees, office employees, engineering department employees, accounting department employees, sales department employees, personnel department employees, time study employees, expeditors, laboratory employees, nurses, quality control inspectors, timekeeping employees, executives, guards, professional employees and supervisors, as defined in the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act.

(a) Upon request, bargain collectively with International Union of Electrical, Radio and Machine

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Workers, Local 613, AFL-CIO, as the exclusive representative of all employees in the aforementioned appropriate unit;

(b) Rescind its 20 year superseniority policy, and restore all strikers who sought reinstatement on June 25, 1959, to the seniority they would have enjoyed absent the 20 year superseniority policy.

(c) Insofar as it has not already done so, offer the employees who went on strike on March 31, 1959, and who were not replaced prior to May 29, 1959, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, or place them on a preferential hiring list, in the manner set forth in "The Remedy" section of this Decision, and make them whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them, in the manner set forth in "The Remedy" section of this Decision.

(d) Offer reinstatement to all recalled strikers who were laid off solely as the result of the operation of Respondent's 20 year superseniority plan, and who would not otherwise have been laid off, and make all discriminatorily laid-off strikers whole for any loss of pay they may have suffered as the result of Respondent's superseniority policy, in the manner set forth in "The Remedy" section of this Decision.

(e) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the seniority and reinstatement rights of employees and

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former employees and the amounts of back pay due under the terms of this Order.

(f) Post at its plants in Erie, Pennsylvania, copies of the Notice attached hereto and marked "Appendix."⁴⁰ Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for the Sixth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is dismissed insofar as it alleges separate Section 8(a)(5) violations of the Act not found herein.

Dated, Washington, D. C., July 31, 1961.

Frank W. McCulloch, Chairman

Philip Ray Rodgers, Member

Boyd Leedom, Member

John H. Fanning, Member

Gerald A. Brown, Member

[SEAL]

NATIONAL LABOR RELATIONS BOARD

40. In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE of the United States Court of Appeals, enforcing an Order."

Decision and Order.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT maintain or give effect to our 20 year superseniority policy, or to any other seniority or lay off policy which discriminates against any of our employees with regard to the order in which they are to be selected for layoff, or with regard to any other aspect of their employment relationship, on the basis of whether they had or had not engaged in strike or concerted activities, or whether they had or had not worked during a strike.

WE WILL NOT discourage membership in INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 613, AFL-CIO, or in any other labor organization of our employees, by refusing them reinstatement upon their unconditional abandonment of their unfair labor practice strike, or by laying them off solely as a result of the operation of a discriminatory superseniority policy, or otherwise discriminating against them in regard to their hire or tenure of employment or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act, as amended.

WE WILL NOT refuse to bargain collectively with INTERNATIONAL UNION OF ELECTRICAL, RADIO AND

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MACHINE WORKERS, LOCAL 613, AFL-CIO, as exclusive bargaining representatives of employees in the appropriate unit, by insisting that the Union agree to a discriminatory strike superseniority plan. Upon request, we will bargain collectively with the aforesaid Union.

WE WILL rescind our 20 year superseniority policy, and restore all strikers who sought reinstatement on June 25, 1959, to the seniority they would have enjoyed absent the 20 year superseniority policy.

WE WILL, insofar as we have not already done so, offer the employees who went on strike on March 31, 1959, and who were not replaced prior to May 29, 1959, immediate and full reinstatement to their former or substantially equivalent positions, dismissing, if necessary, any employees hired since May 29, 1959, to replace them. If, after such dismissal, there are not enough positions remaining for all these employees, the available positions shall be distributed among them, without discrimination because of their union membership, activity, or participation in the strike, following such system of seniority or other nondiscriminatory practice as heretofore has been applied in the conduct of our business. Those strikers for whom no employment is immediately available after such distribution, shall be placed upon a preferential hiring list, and they shall thereafter, in accordance with such list, be offered reinstatement as positions become available, and before other persons are hired for such work. Reinstate-

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ment, as provided herein, shall be without prejudice to the employees' seniority or other rights and privileges.

WE WILL make our employees whole for any loss of pay they may have suffered as a result of our discriminatory refusal to rehire them on June 25, 1959.

WE WILL offer reinstatement to all recalled strikers who were laid off solely as a result of the operation of our 20 year superseniority plan, and who would not otherwise have been laid off, on the basis of their restored seniority, dismissing if necessary employees hired since May 29 who were retained solely because of the operation of the 20 year superseniority plan.

WE WILL make whole all discriminatorily laid off strikers for any loss of pay they may have suffered as the result of our superseniority policy.

ERIE RESISTOR CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Order Correcting Decision and Order.

Order Correcting Decision and Order

On July 31, 1961, the Board issued a Decision and Order¹ in the above-entitled proceeding in which an inadvertent error appeared.

IT IS HEREBY ORDERED that the said Decision and Order be, and it hereby is, corrected by striking from line 12 on page 11 the date "June 28" and substituting therefor the date "June 22."

IT IS FURTHER ORDERED that the said Decision and Order, as printed, shall appear as hereby corrected.

Dated Washington, D. C., August 7, 1961.

By direction of the Board:

HOWARD W. KLEEB

Acting Executive Secretary

1. 132 NLRP No. 51.

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UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

ERIE RESISTOR CORPORATION

and

INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS,
LOCAL 613, AFL-CIOCase No.
6-CA-1790*Gerard Fleischut, Esq.*, for the General Counsel.*Reed, Smith, Shaw and McClay*, by *John G. Wayman, Esq.*, of Pittsburgh, Pa., and *Gifford, Graham, MacDonald and Illig*, by *Irving O. Murphy, Esq.*, of Erie, Pa. for the Respondent.*David S. Davidson, Esq.*, of Washington, D. C., for the Charging Party.Before: *Reeves R. Hilton*, Trial Examiner.**INTERMEDIATE REPORT****Statement of the Case**

Upon a charge, as amended, filed by the International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, through the Regional Director for the Sixth Region (Pittsburgh, Pennsylvania), issued a complaint dated April 7, 1960,

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alleging that the Respondent or the Company has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Labor-Management Relations Act, as amended. In its answer, the Respondent admits certain allegations of the complaint but denies the commission of any unfair labor practices. Pursuant to notice a hearing was held on May 23, 24, 25, and 26, 1960, at Erie, Pennsylvania, before the undersigned Trial Examiner. All parties were present and represented by counsel and were afforded opportunity to adduce evidence, to examine and cross-examine witnesses, to present oral argument and to file briefs. On July 25, all counsel filed briefs which I have fully considered.¹

Upon the entire record and from my observation of the witnesses, I make the following:

Findings of Fact**I. The Company's Business**

Counsel stipulated that the Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and maintains its principal office at Erie, Pennsylvania. The Company also has associated or subsidiary companies which operate other plants in Pennsylvania, Ohio, Mississippi, California, and Canada. The present case involves only the plant at Erie, Pennsylvania. At this plant, during times material herein, the Company was engaged in the manufacture

1. Appended to the General Counsel's brief, as Attachment A, is a motion to correct specified errors in the transcript. The corrections being appropriate and there being no objection thereto, I grant the motion. Attachment A is received in evidence as Trial Examiner's Exhibit No. 1.

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and sale of electronic components, electro-mechanical assemblies, and custom molded plastics. During the 12-month period preceding the issuance of the complaint the Company shipped products valued in excess of \$50,000 to places outside the State of Pennsylvania. For the purposes of this proceeding the Company agrees that it is engaged in commerce within the meaning of the Act. I so find.

II. The labor organization involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The alleged unfair labor practices**A. The issue**

The principal issue is whether the granting of seniority, under the circumstances herein, to replacements of strikers and to strikers and/or other employees who returned to work during the strike constitutes a violation of Section 8(a)(1), (3), and (5) of the Act.

B. The Company's operations at the Erie plant; labor relations history

Counsel stipulated that from about 1943 until 1951, the production and maintenance employees were represented by United Electrical, Radio and Machine Workers of America, CIO, (UE), but since the latter date, and following proceedings before the Board, the employees in that category have been represented by the Union. The Company has had successive collective bargaining agreements covering these employees with the UE and

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the Union, the last agreement with the Union running from April 1, 1957, through March 31, 1959. The agreement contained a union-security clause and a provision for the check-off of union dues.

There is no dispute concerning the appropriateness of the unit alleged in the complaint, namely, all production and maintenance employees, with the usual statutory exclusions and other classifications of employees. I find the unit to be appropriate for the purposes of collective bargaining. I further find, on the basis of the record herein, that the Union represented a majority of the employees in the unit at all times material herein.

The parties stipulated as follows concerning the operations at the Erie plant:

The Company maintained and operated three divisions at the plant; (1) the Electronics Division, which manufactured electronic components, located in the North and South plants, (2) the Electronics-Mechanical Division, which produced electro-mechanical assemblies, located in the East plant, and (3) the Plastics Division, which produced custom molded plastics, situated in the West plant.

As of March 31, 1959, the Company employed a total of 636 employees in its Electronics Division, 345 of whom were employed in the bargaining unit; in the Electro-Mechanical Division approximately 13 of the 51 employees were in the bargaining unit, while in the Plastics Division some 120 out of about 200 employees were in the bargaining unit. In addition, the Company had about 450 employees in the unit on layoff status, approximately 400 of whom had no reasonable expectation of being recalled.

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The parties further stipulated that as of March 31, 1959, under the terms of the union agreement, a male employee needed about 7 years' seniority to hold one of the jobs available, while a female employee required about 9 years' seniority.

As appears below, the Union went on strike at midnight, March 31, 1959, which continued until June 25, 1959, when it was terminated.

The parties also stipulated that the Electro-Mechanical Division, or the East plant, never reopened after the strike and the building is now used by another company. The Plastics Division, or West plant, operated until December 28, 1959, when all operations were discontinued. The Company no longer manufactures custom-molded plastics, but to the extent that such business is still conducted, such operations have been consolidated in a plant operated by a subsidiary company in Ohio. The closing of these divisions and the removal of the plastics operation are not alleged as unfair labor practices and are not issues in the case.

C. The negotiations between the Union and the Company, the strike

By letter dated January 26, 1959, Edward F. Bordonaro, president of the Union, notified the company of the Union's desire to enter into negotiations for a new agreement. On January 30, Gordon D. Ferrell, director of industrial relations, acknowledged the above letter and advised the Union of the Company's intention to change or terminate the agreement upon its expiration date of March 31, 1959.

The parties stipulated that between February 10 and March 31, negotiating committees of the Union and

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the Company, headed by Bordonaro and Ferrell, respectively, held 22 meetings during which they discussed proposals and counterproposals and while they reached agreement on many terms they were unable to conclude a final agreement. As of the latter date the parties had failed to agree upon the Union's demands for a general wage increase, limitation upon the Company's right to subcontract work, freezing seniority for quality control inspectors, vacations, and the payment of group insurance.

Having failed to reach an agreement the Union went on strike upon the expiration of its existing agreement, midnight March 31. The General Counsel concedes the strike was an economic one, but that on and after May 11, it was prolonged by the Company's unfair labor practices which converted the same to an unfair labor practice strike.

The Events during the Strike

Raymond Bertone, administrative specialist under Ferrell, and Lewis J. Shioleno, general manager of the Electronics Division, both of whom were members of the negotiating committee, testified concerning the Company's operations during the strike.

Plainly, all the employees in the bargaining unit responded to the strike call for Bertone and Shioleno stated that during the first month of the strike the Company attempted to continue operations by using clerks, engineers, and other employees who were outside the bargaining unit. Shioleno related the Company had a number of orders on hand for electronic components and due to domestic and foreign competition decided it was

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necessary to operate the Electronics Division plants. Similarly, George Schau, general manager of the Plastics Division, testified that plastic products were manufactured to customer specification so it was essential to try to maintain production in this department. During April, Shioleno stated production in Electronics was about 30 percent of prestrike levels, while Schau said production in Plastics was only 15 to 20 percent of normal production. As production was inadequate to meet customer demands, Shioleno stated that around the end of April the Company decided to obtain replacements for the striking employees.

On May 3, the Company sent a letter to each of the striking employees stating that commencing May 7, the Company was going to obtain replacements and the striker would retain his job until such time as he was replaced, but not thereafter. The local newspaper carried a news article on May 4, quoting from the letter and saying that strikers who failed to report for work by May 7, faced loss of their jobs.

According to a job summary of employees working on production during the strike, produced by Bertone, and prepared from personnel and payroll records, the Company for the workweek commencing May 4, had 140 employees working on production and maintenance jobs, all of whom were clerks or other workers outside the bargaining unit.² As of that date no replacements had been hired nor had any of the strikers returned to work.

2. The initial column of the summary, Respondent's Exhibit No. 12, is captioned "Week Ending," and under this column appears 5-4-59, and successive weeks to 6-22-59. Bertone testified the heading is erroneous and should read for the week beginning May 4, 1959. He further stated that employment figures in other columns cover the entire workweek for the stated period.

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On May 6, Bordonaro addressed a letter to striking employees who had crossed the picket line warning them of penalties that could be imposed by the Union for working in a struck plant or acting as strikebreakers.

Meantime, between April 8 and May 6, the Union and the Company held eight bargaining sessions.

On May 7 and 8, the plant closed down because of mass picketing. As a result thereof the Company discharged five employees for alleged violence in connection with the picketing. The discharge became an issue in the bargaining negotiations, as well as the basis for unfair labor practice charges, but the matter was finally resolved by the parties.

According to the records produced by Bertone, the Company, for the week commencing May 11, hired 1 new employee as a permanent replacement, 23 employees on layoff status reported for work as replacements and 1 striker returned to work.

On May 11, Ferrell advised the Union at a meeting of the bargaining committees that the Company had given assurance to persons hired on returning to work during the strike they would not be laid off upon settlement of the strike, and in order to effectuate its assurances to these persons, the Company had to give them some kind of superseniority, otherwise their jobs would not be permanent. The Union took the position that superseniority was discriminatory and illegal and wanted no part of any such plan.

The Company proceeded with its hiring program and as of the week beginning May 25, it had 8 newly hired employees, 39 employees who had been on layoff

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status and 5 returning strikers. Ferrell, Bertone, and Schieleno testified the replacements, at the time they were hired and thereafter, were given assurance they would not be laid off or discharged when the strike was settled.

As the Company was not securing many replacements under its program, the officials, around May 25, decided upon a plan under which 20 years' seniority, for the purpose of layoff and recall, would be added to the service of anyone returning to work during the strike. Ferrell stated the plan was reduced to writing on May 27, and entitled, "Replacement Policy and Procedure." In brief, the plan detailed procedures for reemployment of striking employees, laid-off employees and new hires and added 20 years' seniority to the regular seniority of all such persons for layoff and recall.

On May 28, Ferrell stated the plan was explained to the Union, although he was not certain whether the Union was presented with a written copy thereof. Bordonaro said the Company outlined the plan and gave the Union a written proposal of superseniority in general terms. The Union asked for a list of the names of striking employees who had been replaced but the Company refused to furnish this information on the basis of the Board's decision in *Oklahoma Rending Company*. (75 NLRB 112)

While the Company did not publicize the plan, nor inform the production workers thereof, the Union about May 30, publicized the plan in a television broadcast.

According to the stipulation of the parties, 12 meetings were held between May 11 and June 5. At each of

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these meetings, as well as subsequent meetings, Bordonaro stated the subject of superseniority was discussed, with the Company taking the position that it must have some form of superseniority and the Union opposing any such provision or plan.

On June 10, the president of the Company sent a letter to all the employees, who were working or on layoff status as of March 31, in which he reviewed acts of violence on the picket line and stated that the Company was instituting a 20-year seniority policy for persons returning to work during the strike.

On June 14, the Company placed a prominent advertisement in the newspaper entitled, "A Report to the Community on the Erie Resistor Strike." In the course of this lengthy report the Company stated it had assured employees returning to work during the strike that they would not be fired or penalized by the Union and that their jobs would not end with the settlement of the strike. The Company also stated that the "Union now asks that the Company withdraw any measure of additional job security for the employees." The ad concluded with the Company saying that for the reasons stated it could not agree to continuation of the union-shop clause, but offered the Union a maintenance-of-membership provision.

On June 15, the Company posted copies of its Replacement Policy and Procedure of May 27, on the plant bulletin boards, with a supplement that the policy was in effect, unless the Union agreed to a substitute plan providing for 20 years' seniority. After the notice was posted the employees were informed that the policy was in effect.

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The Company continued its replacement program and as of the work-week commencing June 22, it had a total of 57 newly hired employees, 70 laid-off employees and 125 returning strikers, plus the 140 clerical and other employees. In addition thereto the Company hired 58 temporary employees whose employment was to terminate upon settlement of the strike.

At the meeting of June 24, the Union, as stated by Bordonaro and Angelo Colella, international representative, submitted a proposal that the strike be terminated on the basis, (1) that the "replacement problem" be resolved by the Board or final disposition by the Federal Courts, (2) the Company to furnish the Union with necessary data on job openings and replacements, (3) strikers who have been replaced to be considered as laid-off employees, (4) that a moratorium be declared on the granting of additional seniority to anyone returning to work while the proposal was being considered, (5) provision for the resolution of the discharges, and (6) the Union agreed to a maintenance-of-membership provision. Colella said that Ferrell agreed to give an answer by June 26. He further stated that following the meeting the Union withdrew the picket line at the plant and publicized its action in the newspapers and on the radio and television stations.

On June 25, the Union sent a telegram to the Company stating it had terminated the strike as of 5:30 p.m., June 24, and that all striking employees desired reinstatement in line with their seniority as per the agreement reached with the Company.

The same day the Company replied by telegram advising the Union that the only agreement reached was

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that the Company would furnish a list of strikers who had been replaced and a list of discontinued jobs. The Company also stated it would call back strikers still eligible for jobs in an orderly fashion as promptly as business warranted.

The Union answered this telegram with another telegram, sent the same day, wherein it requested an early meeting to resolve the one issue between the parties and urged that all the conditions, wages, and hours agreed to would remain in effect.

On June 26, the Company submitted its written reply rejecting the Union's proposed settlement agreement. The Company also presented the Union with a list of strikers who had been replaced, the list being subject to correction. Later, on July 6, the Company gave the Union a corrected list of strikers who had been replaced.

Thereafter, between July 7 and 17, the bargaining committees met on three or four occasions and on the latter date the parties executed a new basic contract and a strike settlement agreement. The basic contract contains a maintenance of membership clause while the strike settlement provides the Company's replacement and job assurance policy is to be resolved by the Board and the Federal Courts and is to remain in effect pending final disposition.

The Hiring of Replacements; the Reinstatement of Striking Employees

After the Company's announcement that it was going to resume operations and start hiring replacements, as expressed in the above-mentioned letter of May 3, Ferrell instructed Bertone to set up procedures for hir-

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ing replacements. As the program was given wide publicity the personnel office received many inquiries concerning employment, in fact the Company received some job applications shortly after the strike started, and applicants were instructed to come to the office where they filled out the standard job application form and were interviewed by Bertone or his associates. The Company did not lower its hiring standards and still required female applicants to be high school graduates, while male applicants had to have some kind of work experience. Bertone stated that when applicants were accepted as permanent employees they were told they would not be laid off or discharged by reason of the settlement of the strike. Bertone knew of the 20-year seniority policy on May 27, and followed the procedure outlined in that statement of policy.

As already stated, the Company, for the workweek of June 22, had hired as permanent replacements, 57 new employees, 70 employees who had been in layoff status, and 125 returning strikers. In addition the Company between June 8 and June 22 hired 58 temporary employees, college students, all of whom were discharged about 1 week after the strike was called off. On June 26, as stated above, Bertone furnished the Union with a list of replaced strikers, which list was later corrected.

Bertone said that when the strike terminated the Company had about 300 applications for employment which were not considered or processed. Ferrell confirmed statements contained in an affidavit given to a Board agent to the effect that the Company had 300 applications on hand and, if it so desired, the Company could have broken the strike and replaced all the strik-

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ing employees. Continuing, he stated that since there were some 10,000 unemployed persons in the labor area, there would have been no difficulty in finding sufficient employees, but the Company proceeded slowly in its replacement program in order to preserve, if possible, a continuity of employment. Colella also testified, and his testimony was not contradicted, that at the bargaining session on June 5, Shioleno declared the Company had 300 applications and that the Company was ready to replace the strikers but he stopped the plan because he did not want to break the Union.

On one occasion, June 17, the Company placed an advertisement in the newspaper for female employees. The ad stated women were wanted "for steady work," gave the general job qualifications, and that applicants should call the office for interview.

The General Counsel also produced four official publications by the United States Department of Labor, entitled, "Area Labor Market Trends," which were received in evidence. These publications disclose that before and throughout the strike the city of Erie was classified as an "F" chronic surplus area, that is, job seekers were substantially in excess of job openings.

Bertone testified that following the termination of the strike the Company recalled the striking employees who had not been replaced and whose jobs had not been eliminated. The strikers were recalled in the order of their seniority, except for the first 2 weeks when the Company reinstated certain experienced workers it needed for specialized products. Bertone confirmed the fact that all persons who came to work during the strike, excluding the temporary works and clerical and other

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workers, were given 20 years' seniority for layoff and recall. He added superseniority could not be used for the purpose of job "bumping."

Bertone produced a summary of company records showing the total number of employees in the bargaining unit, on a weekly basis, following the settlement of the strike. For the workweek commencing June 29, the Company had 358 employees, which number gradually increased so that by the week of September 21, there were 442 employees in the unit. Thereafter, the number steadily decreased and for the week of April 25, 1960, there were but 240 employees in the unit. Ferrell admitted that the application of the superseniority policy resulted in the layoff of many employees, the reinstated strikers, who otherwise would have been retained. The General Counsel does not contend the reduction-in-force was discriminatory, but that the Company's utilization of superseniority in selecting employees for layoff was discriminatory and violative of the Act.

The Withdrawals from the Union

Shioleno testified that on June 30, he called a meeting of the employees to inform them the Union had agreed to a maintenance-of-membership clause and it was up to them whether they wished to become or remain members of the Union, or refrain from becoming or remaining union members. In this connection Shioleno exhibited and explained three cards to the employees; one card, of pink color, was a form of resignation from the Union and revocation of the union dues' check-off, a white card, which was an application for membership in the Union and a green card, an authorization for

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check-off of union dues. Shioleno advised the employees the cards would be available at the foreman's desk. Bordonaro testified the Union received about 173 pink or withdrawal cards between July 1 and 17, and some 17 similar cards subsequent thereto. I mention the foregoing as part of the chronology of the case. Under the circumstances I find nothing unlawful in the Company's actions.

D. The applicable decisions

The General Counsel contends that the Company's adoption of the 20-year seniority, under the circumstances found above, was, and is, unlawful on the theory, (1) that such action was illegal *per se*, and (2) that the policy was motivated by unlawful considerations.

The Company asserts there is no authority to support the *per se* theory and that the evidence shows that the policy was announced and adopted for legitimate economic reasons.

There is no dispute the Company had the right to permanently replace the strikers since the strike was an economic one. Speaking of this right the Supreme Court, in *N. L. R. B. v. Mackay Radio & Telegraph Co.*, (304 U. S. 333, 345-246), plainly stated:

... an employer, guilty of no act denounced by the statute, has [not] lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon election of the latter to resume their employment, in order to create places for them. The assurance by [the employer] to those who accepted employment during

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the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.

Here the controversy centers on the announcement and adoption of the 20-year seniority policy granted to striking employees, laid-off employees, and new hires who crossed the picket line. The Board and the Courts, in several cases, have passed upon the legality of a policy which accords a form of superseniority to nonstrikers or strike replacements as against strikers.

The issue was first presented in *Potlatch Forests, Inc.*, 87 NLRB 1193 (1949). There the Union called an economic strike on August 7, 1947, after an impasse in negotiations, which resulted in a shutdown of the Respondent's operations. A few weeks later strikers began crossing the picket line, new employees were hired as replacements and by October 10, the Respondent had some 1,750 employees out of a normal complement of 2,600 workers. The parties met on several occasions between October 7 and 10, and one of the subjects discussed related to procedures to be followed in getting the strikers back to work and how replacements and returned strikers were to be protected in the jobs they were holding at the termination of the strike. On October 12, the parties reached a strike settlement agreement which included a provision that all former employees would return to work without discrimination on October 13, and no later than October 22, in order to protect their job rights. Shortly after the execution of this agreement, company officials determined upon and drafted a "Return-to-Work Policy," which they claimed was to provide

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a guide for uniform interpretation and application of the strike settlement agreement. The pertinent portion of the policy provided for the division of employees, for purposes of determining seniority upon a reduction-in-force, into two classes, one composed of those who had crossed the Union's picket line during the strike; the other made up of employees who remained out on strike during its entire course. This form of superseniority was later referred to by the Respondent as "strike seniority." The "Return-to-Work Policy" was drafted without consulting the Union and after it was drafted it neither submitted it to any union official, nor was it printed or otherwise generally publicized among the employees. In fact employees became aware of "strike seniority" only when they as individuals inquired about their own seniority status. Although officials of the Union did not see a copy of the policy until June 1949, the Union was aware that the Respondent was maintaining a policy of preferential treatment to employees who had worked during the strike.

The Respondent's principal defense was that the Union agreed to "strike seniority" as part of the settlement agreement. This defense was rejected and the Board held that a seniority policy which classified employees on the basis of whether they had or had not worked during a strike, to the detriment of the latter group, was discriminatory and violative of Section 8(a) (1) and (3) of the Act.

In denying enforcement of the Board's order, *N. L. R. B. v. Potlatch Forests, Inc.*, (189 F. 2d 82, 86 (C. A. 9)), the Court held that the evidence was insufficient to establish that the true purpose motivating the

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Respondent's adoption of the "strike seniority" policy was a desire to penalize those members of the Union who had most persistently asserted the Union's demands. The Court stressed the fact that the Company had advocated "strike seniority" before the strike was settled and adopted that policy at the time of the settlement of the dispute. The Court concluded that "the 'discrimination' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by the strikers.'" The Court further stated that the record did not disclose that the Respondent in fact had assured the replacements that "their places might be permanent," but that such assurance need not be proved.

The issue next arose in *Olin Mathieson Chemical Corporation*, 114 NLRB-486 (1955). Following the termination of a strike, and after all the strikers had been put back to work, the Respondent, for the first time, decided to separate its employees into two seniority groups for layoff purposes, depending on whether or not they had returned to work before the end of the strike. The Respondent did not contend that, as an economic measure to get employees to work during the strike, it had promised them superseniority. There is no indication the Respondent hired or attempted to hire replacements. In an ensuing economic layoff the Respondent in effect dismissed the complainants because they remained on strike, while retaining an equal number of other employees with less seniority because they returned to

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work. It was stipulated the complainants would not have been laid off except for the superseniority policy. In finding a violation of the Act, the Board held that "the Respondent's change of seniority policy and its consequent dismissal of the complainants were in fact motivated, not by any legitimate economic interest of its own, but by a desire to punish the complainants for exercising the right guaranteed in Section 7 to engage in concerted activities, and a wish to reward the other employees for abandoning or not participating in the strike." The Board was of the unanimous opinion that the *Potlatch* decision was distinguishable on its facts.

The Circuit Court of Appeals for the Fourth Circuit fully sustained the Board's findings and conclusions in *Olin Mathieson Chemical Corporation v. N. L. R. B.*, 232 F. 2d 158. (Affirmed without opinion, 325 U. S. 1020). The Court also pointed out that the case differed factually from the *Potlatch* case in that the "strike seniority" in *Potlatch* was advocated before the strike was settled and adopted at the time of the settlement thereof. Moreover, there was an absence of unlawful motivation on the part of *Potlatch*. However, the Court disagreed with a portion of the *Potlatch* opinion wherein the Ninth Circuit held that assurance to replacements that their jobs would be permanent need not be proved. On this point the Fourth Circuit stated:

With a strike in progress, the primary concern of the employer is to keep his plant in operation. It is then proper for an employer, who might be unable to procure replacements save upon a promise of permanent tenure, to promise such tenure to the replacements.

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The question was determined the third time in *California Date Growers Association*, 118 NLRB 246 (1957). Here the Respondent instituted a seniority policy under which seniority of striking employees was reduced below that of nonstrikers and replacements. Although the Respondent claimed this action was necessary for economic reasons the superseniority policy was not announced until the Respondent published its hiring list, more than 3 months after the strike ended. The timing of this action, the Board said distinguished the case from the *Potlatch* case, and the Board reaffirmed its views as expressed in the *Olin Mathieson* decision. Continuing, the Board found that the Respondent in adopting the superseniority policy, at a time when it was engaging in other unfair labor practices, was motivated by a desire to discriminate against the striking employees rather than for economic reasons. The Board further found that while the Respondent may have generally told the replacements they would be "maintained" after the strike, the replacements were not informed of any new seniority policy until publication of the hiring list. Moreover, one of the Respondent's officials admitted that no mention was made about loss of seniority to strikers who were offered reinstatement after the strike because the Respondent did not want to "agitate the situation." The Board concluded by stating that while the Respondent had the right to permanently replace the strikers, "This is not to say, however, that the Respondent after the strike was over could go further than that and reduce the seniority of returning strikers, who had not been replaced, to punish them because they engaged in protected concerted activity." In these circumstances the

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Respondent violated Section 8(a) (1) and (3) of the Act.

The Board's order was enforced by the Ninth Circuit Court of Appeals in *N. L. R. B. v. California Date Growers Association*, 259 F. 2d 587. The Court stated that the decisions in the *Mackay Radio* and *Potlatch* cases indicate the Respondent's adoption of the seniority policy did not constitute, *per se*, an unfair labor practice and that such action in particular situations may be perfectly permissible within the Act. Nevertheless, "the motive of the employer in carrying out these actions becomes the controlling factor," citing the *Olin Mathieson* decision. The Court pointed out that the facts make the instant case clearly distinguishable from the *Potlatch* case, in that in *Potlatch* "the employer made its position as to 'superseniority' and protection of employment tenure for nonstrikers, clear and open before the termination of the strike," whereas in the instant case the employees were not informed of the change of seniority "until long after the settlement of the strike." The Court held there was substantial evidence to support the Board's finding that the Respondent's adoption of the superseniority policy was motivated by a desire to punish the strikers.

The most recent decision dealing with this issue is *Ballas Egg Products, Inc.*, 125 NLRB No. 45, 45 LRRM 1100, decided November 25, 1959. In this case the Union, in the summer of 1957, engaged in a campaign to organize the Respondent's employees. During this drive the Respondent interrogated its employees concerning their union activities, threatened to shut down the plant if the employee was selected the Union as their bargaining agent,

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encouraged the formation of a labor organization of its own choosing, and transferred an employee because of activities on behalf of the Union. In a complaint proceeding the Board found that this conduct interfered with the rights guaranteed the employees under the Act in violation of Section 8 (a) (1) thereof. (121 NLRB 873)

On July 3, 1957, the Union called a strike. Some 83 employees joined the strike while about 75 remained at work. On July 5, the Respondent assembled the non-strikers in the plant and informed them that they would be given preference in retention in future layoffs over new hires and strikers who might later return to work. While the Respondent believed this policy would keep the plant in operation, it made no mention of this belief to the nonstrikers when the policy was announced.

The strike terminated July 19, without any replacements being hired or sought during the period of the strike. With the end of the dispute the strikers requested reinstatement. Due to the seasonal decline in business, the Respondent had only 14 job openings, so it reinstated 14 strikers and placed the remaining strikers on a preferential hiring list. The strikers were not informed of the new superseniority policy. With the start of the busy season, around January 1958, the Respondent recalled 19 additional former strikers. In July the Respondent found it necessary to lay off 12 employees and in August it laid off 2 more employees. In line with its new seniority policy the Respondent selected 14 strikers for layoff. This was the first time that the strikers were aware of this policy. The parties stipulated that if the Respondent's former seniority policy had been utilized

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in this layoff, 11 of the 14 former strikers would have retained their jobs.

The Board found that the Respondent's motivation in adopting, maintaining, and utilizing its superseniority policy was impelled by antiunion considerations rather than any economic interest of its own, and the case is controlled by the Board and Court decisions in *California Date Growers* and *Olin Mathieson*. The Board noted that, as in the *California Date Growers* case, the Respondent's discriminatory motive was evidenced by unfair labor practices which occurred immediately prior to the announcement of its superseniority policy. And, as in the *Olin Mathieson* case, the illegality of the Respondent's motivation stems from the fact that it neither hired nor sought replacements during the strike and there is no probative record evidence that the adoption and announcement was necessary to entice strikers to remain at work. Accordingly, the superseniority violated Section 8(a)(1) and (3) of the Act. The Board stated it was unnecessary to, and did not, pass upon the Trial Examiner's further finding that the Respondent's conduct was unlawful under the Board's holding in the *Potlatch* case (which finding is cited at length in the General Counsel's brief), because the facts are different from those in the *Potlatch* case.

Analysis and Concluding Findings

I have no difficulty in concluding that the alleged violation may not be sustained on the *per se theory*. Granting, as argued by the General Counsel, that the *Potlatch* case was decided on that basis and that it has not been specifically overruled, subsequent decisions by the Board distinguish *Potlatch* and make it clear that

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motive is the controlling factor in determining the legality of an employer's institution of a superseniority policy or plan.³

The remaining issue, therefore, is whether the evidence supports the General Counsel's alternate theory that illegal motivation prompted the Company's announcement and establishment of the 20-year seniority policy.

As detailed above, the Company made no effort to hire replacements during the first month of the strike but attempted to maintain operations at the plant with employees outside the bargaining unit. As this force was unable to meet production demands the Company, on May 3, wrote the strikers that it was going to obtain replacements commencing May 7. The Union countered with a letter to some of the strikers warning them of penalties that could be imposed against strikebreakers. While Bordonaro asserted the letter was sent to strikers who had crossed the picket line, no strikers had returned to work as of that date.

The Company was unable to secure any replacements on May 7, in fact the plant was closed down on May 7 and 8 because of mass picketing.

On May 11, Ferrell advised the Union the Company had assured employees hired or returning to work during the strike that their jobs would be permanent and the Company had to give them some type of superseniority. The Union summarily rejected any such plan. The Company proceeded with its hiring program and advised replacements their jobs would be permanent.

3. See also, *Twenty-Second Annual Report of the Board*, pp. 71-72.

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Since the Company was not securing a sufficient number of replacements its officials on May 25, decided upon the 20-year superseniority policy and notified the Union of the policy on May 28. Although the Company did not publicize the policy the Union did so in a television broadcast. Bordonaro also admitted the subject of superseniority was discussed at some 12 bargaining sessions between May 11 and June 5, as well as meetings subsequent thereto.

On June 10, the Company sent a letter to all employees who were working or on layoff status as of March 31, informing them of the 20-year seniority policy.

On June 14, the Company placed an ad in the newspaper that replacements would not lose their jobs upon settlement of the strike.

On June 15, the Company posted copies of its Replacement Policy and Procedure and informed the employees the policy was in effect. Thereafter the Company continued to hire replacements.

On June 25, the Union notified the Company it had terminated the strike.

On July 17, the parties executed a new basic contract and a strike settlement agreement, the latter providing that the legality of the superseniority policy shall be determined by the Board and the Courts.

In my opinion the facts in this case, tested with the criteria set forth in the applicable decisions, are wholly inadequate to support a finding that the Company adopted the superseniority policy for proscribed purposes. Here the Company has a record of contractual

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relationships with the Union and its predecessor for many years and the present controversy is bottomed exclusively on the superseniority policy. Unlike the facts found in the *Olin Mathieson*, *California Date Growers* and *Ballas Egg* cases, the Company announced and adopted its superseniority during the course of the strike, not subsequent to the settlement thereof. Again, unlike the circumstances present in *California Date Growers* and *Ballas Egg*, there is no contention, much less evidence, that the Company was engaging in, or had engaged in, any other unfair labor practices at or about the time it announced and adopted the superseniority policy. The facts also differ from those in *Olin Mathieson* and *Ballas Egg*, in that the Company sought and hired replacements during the strike, whereas the employers in those cases neither hired nor sought replacements during the strike. Thus, in the instant case there is a complete absence of the factors which the Board has relied upon as evidence of illegal employer motivation in the announcement and adoption of a superseniority policy. Nor do I find any other factors upon which a finding of illegal motivation might be predicated.

The General Counsel concedes that an employer may "induce" prospective replacements to work during an economic strike by the granting of additional seniority, if this is necessary to secure their services for the continuation of his business. In this case, he argues that the Company has failed to prove it was necessary to grant superseniority in order to obtain replacements. While the General Counsel has carefully screened the record for evidence to support his necessity argument, he relies principally upon the fact that the Company had 300 unprocessed job applications when the strike ended.

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certain statements by Ferrell and Shioleno and the failure of the Company to communicate its superseniority policy to prospective replacements before they were hired.

It is true the Company did have 300 unprocessed applications at the termination of the strike. I am also satisfied that at the baragining session of June 5, Shioleno declared, in the course of a heated argument, that the Company could have replaced the strikers but he prevented it because he did not want to break the Union. Likewise, Ferrell admitted the strike could have been broken, but the Company "proceeded slowly in its replacement program so as to preserve, if possible, a continuity of employment." There is no doubt that the question of whether it was necessary to grant superseniority in order to obtain permanent replacements is an element to be considered in determining the employer's motive for his action. Actually, the only evidence tending to support the General Counsel's position is the fact that the Company had 300 job applications, which he characterizes as, "The crushing blow to Respondent's case." At first glance this fact might appear impressive, but when considered in the context of the Company's course of action it loses its importance and is wholly insufficient to warrant a finding of unlawful motivation on the part of the Company. Further, the Company's employment records refute the idea that it was able to secure replacements without some form of superseniority. A summary of these records shows the following hirings, exclusive of temporary replacements:

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<i>Week Commencing</i>	<i>Permanent Replace- ments</i>	<i>Laid Off Employees</i>	<i>Returning Strikers</i>
	<i>New Employees</i>	<i>Permanent Replace- ments</i>	
May 11, 1959	1	23	1
May 18,	1	32	4
May 25,	8	39	5
June 1,	18	39	8
June 8,	34	47	23
June 15,	43	59	87
June 22,	57	70	125

Thus, in my opinion, the employment records fully sustain the Company's position that the replacement program was ineffective until the Company announced its superseniority policy for replacements.

Nor do I see how the statements of Shieleno and Ferrell warrant the conclusion or inference that the adoption of the superseniority policy was prompted by antiunion considerations. On the contrary, these expressions make it clear that the policy was promulgated for economic reasons, not for illegal or discriminatory purposes.

The General Counsel asserts the Company made no effort to communicate its superseniority policy to prospective replacements or unemployed workers and that the assurance was given to replacements after they were hired, not while they were still prospective replacements, which shows there was no need to grant superseniority. The manner in which the policy was announced and publicized by the Company, as well as the Union, is set forth above; and I believe it is reasonable to infer that the

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public and persons interested in employment were aware of the policy. The General Counsel's attempt to draw some distinction between hired replacements and prospective replacements is a fine one and without substance. The undisputed evidence shows that when replacements were hired they were assured their jobs would not cease with the termination of the current strike, and such assurance is sufficient under the applicable decisions. At the same time, the General Counsel contends that the Company's communication of its superseniority directly to the Union, the laid-off employees, and the strikers proves that the Company was seeking to induce the strikers to abandon the strike, therefore, its motive "must have been to punish employees who continued to exercise their rights under the Act." Certainly, the Company had the right to propose a superseniority plan to the Union as a subject for bargaining, albeit the subject was a hard and difficult one from the Union's standpoint. As might be expected, the parties were unable to reach agreement on superseniority, although it was discussed at practically every bargaining session held subsequent to May 11. Insofar as presenting the plan directly to the strikers and laid-off employees the Company did nothing more than send a letter to the strikers, on May 3, stating it intended to hire replacements and later, following an impasse in the negotiations, the Company, on June 10, addressed a letter to the strikers and the laid-off employees advising them of the 20-year seniority policy. Since there was nothing unlawful in the Company's course of conduct, I find it may not serve as a basis for inferring that the Company established the policy to punish the strikers, as urged by the General Counsel.

The General Counsel advances other points and arguments, such as the Company's insistence upon and uni-

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lateral adoption of the superseniority policy, as additional violations of Section 8(a)(5). He admits these so-called violations stem from the basic issue and are not essential to a finding that the superseniority policy is violative of the Act under the *Potlach* case. While I have considered these points and arguments, I do not deem it necessary to discuss them.

In summary, the issue here calls for the balancing of somewhat conflicting rights of the employees to engage in an economic strike and that of the employer to maintain and operate his business. Thus, the Supreme Court recognized in *Mackay* that the Employer's legitimate interest in continuing operation of his plant was a right to be balanced against the broad statutory protection granted economic strikers. In other words, an employer is not required to underwrite an economic strike by shutting down while it is in progress and reinstating the strikers after it is over, but is entitled to keep his plant running if he can and find men to do the work of the strikers. If he could hire men only for the duration of the strike, subject to displacement on the return of the strikers, he obviously would have little or no chance of hiring anyone. Accordingly, the balance between the employee's risk of losing his job by striking and the employer's risk of losing his business through an inevitable shutdown has been struck in favor of the employer. As I view it, the Ninth Circuit in *Potlach* extended the principle of *Mackay* and held that replacements could be given superseniority, provided there was no discriminatory motivation, but merely an intent to operate the business involved. Subsequent decisions of the Board and the Courts, *Olin Mathieson*, *California Date Growers*, and *Ballas Egg*, hold that the motive of the employer is the

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controlling factor in determining whether the policy or plan was for legitimate economic reasons or to punish or retaliate against the strikers for their participation in protected union activities. From the evidence and findings herein, I am convinced, and find, that the 20-year seniority policy of the Company was announced and adopted for legitimate economic reasons.

In view of this finding, it follows that the strike which was economic in its inception was not thereafter converted into an unfair labor practice strike and the subsequent layoff of strikers, who would have been retained except for the utilization of the superseniority policy, was not discriminatory.

Upon the basis of the foregoing findings of fact and upon the entire record, I make the following:

CONCLUSIONS OF LAW

1. The operations of the Respondent occur in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not engaged in unfair labor practices as alleged in the complaint within the meaning of Section 8(a)(1), (3), and (5) of the Act.

RECOMMENDATION

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that the complaint be dismissed.

Dated at Washington, D. C.

REEVES R. HILTON

Trial Examiner

*Appearances.***Excerpts From the Transcript of Testimony**

BEFORE
THE NATIONAL LABOR RELATIONS BOARD
SIXTH REGION

In the Matter of:

ERIE RESISTOR CORPORATION,

and

INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS, Local
613, AFL-CIO.

Case No.
6-CA-1790

United States Court House
Erie, Pennsylvania
Monday, May 23, 1960

Pursuant to notice, the above entitled matter came on for hearing at 10:00 o'clock, a. m.

Before: *Mr. Reeves R. Hilton*, Trial Examiner.

APPEARANCES:

Mr. Gerard Fleischut, 2107 Clark Building, Pittsburgh, Pennsylvania, appearing as counsel for the general counsel.

Mr. John G. Wayman, Reed, Smith, Shaw and McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania, appearing on behalf of Erie Resistor Corporation, the Respondent.

Mr. Irving O. Murphy, Gifford, Graham, MacDonald and Illig, 615 Masonic Building, Erie, Pennsylvania, appearing on behalf of Erie Resistor Corporation, the Respondent.

Offers of Counsel.

Mr. David S. Davidson, 1126 Sixteenth Street, N. W. Washington 6, D. C., appearing on behalf of International Union of Electrical Radio, and Machine Workers, Local 613, AFL-CIO, the Union.

[5] *Mr. Fleischut:* Before the hearing opened the parties had explored the possibility of certain stipulations, and I would like to go off the record at this time to confirm those stipulations or explore them further.

Trial Examiner: Before you do that would you mind putting in the formal papers, and while you are doing that I can be looking over the formal papers.

Mr. Fleischut: Yes, sir. I wish to offer into evidence the original and duplicate of the formal documents marked General Counsel's Exhibits 1 (a) through (r). General Counsel's Exhibit 1(r) is an index and description in detail of the exhibits (a) through (r), and they have been inspected by the parties.

(Thereupon, the documents above referred to were marked General Counsel's Exhibits Nos. 1(a) through 1(r) for identification.)

[6] *Trial Examiner:* Is there any objection, Mr. Wayman?

Mr. Wayman: I have this objection. I believe from my examination of the files there is an additional paper. At least one of these charges was withdrawn, and I am a little puzzled exactly which charge the complaint was based upon, but I feel sure one of the charges was withdrawn, and I think that paper should be included in order to avoid confusion as to which charge is the basis of the complaint.

Offers of Counsel.

Trial Examiner: Would you want to reserve the right to raise that question, and receive the documents in evidence now, reserving that?

Mr. Wayman: I think that would be well.

Trial Examiner: I think that protects your rights.

Mr. Wayman: Surely, as long as that is protected.

Trial Examiner: Is that satisfactory to you, Mr. Fleischut?

Mr. Fleischut: Yes, and may we go off the record?

Trial Examiner: Wait until I receive them in evidence. General Counsel's 1(a) through 1(r) may be received in evidence and so marked.

(The documents heretofore marked General Counsel's Exhibits Nos. 1(a) through 1(r) for identification were received in evidence.)

Trial Examiner: Does counsel want to confer at this time?

Mr. Wayman: If you please, sir.

[7] *Trial Examiner:* All right, we will take a break, then, and go off the record.

(Discussion off the record.)

Trial Examiner: All right, the hearing will be in order.

Mr. Fleischut: During the off-the-record period the parties arrived at certain stipulations which will be read into the record by Mr. Wayman.

Trial Examiner: All right, go ahead, Mr. Wayman.

Offers of Counsel.

Mr. Wayman: This is a stipulation that Mr. Fleischut and I agreed upon during our off-the-record conversation, and I will read it into the record so that all can hear it.

Erie Resistor Corporation, hereinafter called the "Company", is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. Its principal office is located in Erie, Pennsylvania.

The Company has associated or subsidiary companies which operate plants in Pennsylvania, Ohio, Mississippi and Canada, but the Company itself maintains and operates manufacturing facilities in Erie, Pennsylvania, where, at the times material to this case, it had three operating divisions, known as the Erie Electro-Mechanical Division, the Erie Electronics Division and the Erie Plastics Division. There are two other plants of the Company, one in Hawthorne, California, and one in State College, Pennsylvania, which are not in any way concerned in this case.

[8] The Company, during the times material to this case, was engaged in the manufacture and sale of electronic components, electro-mechanical assemblies and custom molded plastics at its Erie facilities. During the twelve-month period preceding the date of the complaint, the Company at the Erie, Pennsylvania plants above mentioned, shipped products of a value in excess of fifty thousand dollars directly to points outside Pennsylvania.

For purposes of this case it is stipulated that the Company is engaged in interstate commerce within the meaning of the National Labor Relations Act, as amended.

Offers of Counsel.

During the times material to this case, the following general description of the plants and operations are applicable:

The Electronics Division was located in two buildings on West 12th Street in Erie, Pennsylvania. One building was commonly called the "South Plant", and was located on the south side of the street, being number 645 West 12th Street.

The other plant of the Electronics Division, commonly called the "North Plant" or the "Main Plant", was located on the north side of the street directly opposite the South plant, and was number 644 West 12th Street.

Both plants of the Electronics Division manufactured electronic components. On March 31, 1959 there was a total of approximately six hundred thirty-six in the Electronics Division on the active payrolls. Of this number, approximately [9] three hundred forty-five were in the bargaining unit represented by IUE-AFL-CIO, and its Local 613.

The Electro-Mechanical Division, commonly called the "East Plant", was located at 530 West 12th Street. That plant produced electro-mechanical assemblies. On March 31, 1959, there were approximately fifty-one in the Electro-Mechanical Division on the active payrolls. Of this number, about thirteen were bargaining-unit employees.

The Plastics Division, commonly called the "West Plant", was located at 1345 West 12th Street. It produced custom molded plastics. On March 31, 1959, there was a total of about two hundred in the Plastics Division, of

Offers of Counsel.

which about one hundred twenty were bargaining-unit employees.

In addition to those on the active payrolls, the Company, on March 31, 1959, had on layoff approximately four hundred and fifty bargaining-unit employees. These laid-off employees had been on layoff for substantial periods of time due to a decline in the Company's business and operations in these plants, and, according to the best estimates the Company was able to make on the basis of the business on the books and forecast, the great majority—probably four hundred out of the four hundred fifty—had no reasonable expectation that they would be recalled.

As of March 31, 1959, and under the Union agreement that expired at midnight that day, an employee needed approximately [10] nine years' seniority for a female employee and seven years' seniority for a male employee in order to hold one of the jobs then available.

The Electro-Mechanical Division, or East Plant, never reopened after the strike. The electro-mechanical operation had been steadily declining prior to the strike, and the company concluded that it was no longer economically feasible to engage in the manufacture of these products in Erie.

Trial Examiner: Let me interrupt. What plant was it that did not reopen?

Mr. Wayman: The electro-mechanical division, the East plant.

Trial Examiner: All right, go ahead.

Offers of Counsel.

Mr. Wayman: The Building itself is now occupied by another company, and is used to manufacture another product not similar to electro-mechanical assemblies.

The Plastics Division, or West plant, operated until December 28, 1959, when all operations there were discontinued. The Company no longer manufactures custom-molded plastics, but to the extent that this business is still conducted, the plastic manufacturing operations have been consolidated in a plant operated by a subsidiary company in Andover, Ohio, which has been devoted exclusively to molding and finishing of plastic products for many years.

The closing of the electro-mechanical plant and the [11]-removal of the plastics operation to Andover are not alleged by General Counsel to be violative of the Act, and are not in issue in this case.

From about 1943 to 1951, the production and maintenance workers at the Erie plants of the Company were represented by the United Electrical, Radio and Machine Workers of America, commonly called "U.E.", then affiliated with the CIO.

In 1950 the International Association of Machinists, I.A.M., and in 1951 the International Union of Electrical, Radio and Machine Workers—then C.I.O., now AFL-CIO—commonly called "I.U.E.", petitioned for representation. The Board issued a decision and direction of election on or about May 17, 1951, in Case No. 6-RC-744 and Case No. 6-RM-62. The first election was inconclusive, the voting being—of twelve hundred and eighteen eligible—three hundred forty-nine for IAM, four hundred forty-six for IUE, one hundred twenty-four for UE, twenty-one

Offers of Counsel.

for no union, and thirteen challenged. In a run-off election, on or about June 28, 1951, between IAM and IUE, the vote was four hundred thirty-one for IAM and four hundred eighty-five for IUE. On August 2, 1951 the Board certified the IUE as representative of the employees in a unit described in the direction of election as follows: And I quote:

"All production and maintenance employees at Respondent's Erie, Pennsylvania plants, excluding clerical employees, office employees, engineering department [12] employees, accounting department employees, sales department employees, personnel department employees, time study employees, expeditors, laboratory employees, nurses, quality control inspectors, timekeeping employees, executives, guards, professional employees and supervisors as defined in the Act."

By mutual agreement since the certification, by contract usage, the certified unit is described as follows:

"Included: All production and maintenance Employees.

"Excluded: Supervisory employees, clerical employees, office employees, engineering department employees, accounting department employees, sales department employees, personnel department employees, time study employees, expeditors, plant protection employees, laboratory employees, nurses, quality control inspectors, timekeeping employees and executives."

No matrons have been employed for several years. Matrons have been dropped from the description of ex-

Offers of Counsel.

clusions. In all other respects the unit described by contract is substantially the same as that certified.

The appropriate unit, as alleged in Paragraph 5 of the Complaint, describes the bargained-for unit, with the statutory exclusions listed in the traditional fashion at the conclusion of the unit description.

The Company and the UE had been accustomed to enter into [13] written collective bargaining agreements during the years the UE represented the employees.

- After the IUE was certified, the Company and the IUE negotiated a new contract dated November 14, 1951, which expired November 15, 1952. Contracts were entered into in the succeeding years, the last contract prior to the events with which this case is concerned being effective April 1, 1957 and continuing in effect through March 31, 1959.

On January 26, 1959 Edward F. Bordonaro, President of Local 613, for that local and on behalf of the International IUE, sent Mr. Gordon D. Ferrell, Director of Industrial Relations of the Company, a letter informing the Company that in accordance with the provisions of Section 66 of the contract, the Unions desired to enter into negotiations with respect to matters, both economic and non-economic, which it would present in the negotiations. The letter also suggested that the initial meeting take place February 4, 1959.

On January 30, 1959, Mr. Ferrell sent a letter to Mr. Bordonaro informing him of the desire of the Company to change, modify or terminate the agreement upon its expiration date of March 31, 1959, and stating the Com-

Offers of Counsel.

pany would arrange to meet with the Union at reasonable and mutually agreeable times to negotiate a new contract.

On February 2, 1959, Mr. Ferrell sent Mr. Bordonaro a letter replying to the Union's letter of January 26th, and [14] suggesting a meeting at 9:00 a.m. on Tuesday, February 10, 1959, in the personnel conference room, where such meetings were customarily held, to begin negotiations.

The first meeting was held on February 10, 1959.

This is the stipulation to which Mr. Fleischut and I have agreed, and Mr. Davidson for the Union.

Trial Examiner: All right, then, the stipulation may be received in evidence.

Mr. Wayman: If I may, I will hand the reporter this copy from which I have been reading, so he may be able to follow some of my words that may not have been entirely distinct.

Trial Examiner: I think they were distinct, but they came at me so fast I don't know how many I have got.

Mr. Wayman: Now, in addition to this stipulation, we have developed a list of the meetings, showing, as nearly as we are able, the date on which the meeting was held, the hours as nearly as we can come, and the names or identities of the persons present at the meetings.

We should like, with the Trial Examiner's permission, to mark this perhaps as Joint Exhibit or a Company exhibit and submit it in evidence simply for the purpose of making it easier to refer to these various dates and

Offers of Counsel.

times and persons. It is subject, of course, to correction—if any correction there need be—by the testimony of the witnesses, but it is a con-[15] venient way of following the meetings.

Trial Examiner: Is there any objection to that?

Mr. Fleischut: No, but I would just like to add this, however. The stipulation covers some fifty-two meetings, and there have been various differences as to hours. I don't recall if there are any as to dates or not, and it is to be understood the purpose of the stipulation is to provide the witnesses with a ready reference to these many dates and hours, and is subject to their corrections, as their recollection may dictate.

Trial Examiner: You don't question the dates on which the meetings were held, but there might be some question as to the hours?

Mr. Wayman: Or maybe as to the persons present, but I think, except as corrected, we might say this represents the best recollection of everybody as to when the meetings were held.

Mr. Fleischut: It is a joint effort.

Trial Examiner: You want to offer this as a company exhibit?

Mr. Fleischut: You want to offer it as a Joint exhibit?

Trial Examiner: A joint exhibit, or can you give it a General Counsel's number or a Respondent's exhibit number.

Mr. Fleischut: Let us give it a General Counsel's Exhibit Number.

Offers of Counsel.

[16] *Trial Examiner:* All right. It may be marked as General Counsel's Exhibit 2.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Trial Examiner: And it may be received in evidence and marked General Counsel's Exhibit 2.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification, was received in evidence.)

Mr. Wayman: If the Trial Examiner please, in connection with this exhibit, we have worked it over so many times we have only one copy, and I ask leave to withdraw it at lunch time and have copies made.

Trial Examiner: Very well, you may do that.

Mr. Fleischut: It will be General Counsel's Exhibit 2.

Trial Examiner: That's right. Does that conclude the stipulation?

Mr. Fleischut: Yes.

Mr. Wayman: Yes, sir.

Trial Examiner: Are there any preliminary matters you wish to bring up at this time?

Mr. Fleischut: Yes, I would like to make some minor amendments in the Complaint. The first matter which I wish to bring to the attention of the Trial Examiner is that attached [17] to the Complaint is a long list of names referred to as Attachment "A".

Offers of Counsel.

Now, there are some additions and corrections to be made to this list. These additions and corrections will be developed in the course of the testimony.

I might add at this point—and I will in my opening statement develop it more fully—attachment "A" does not represent to be a list of all discriminated employees or 8(a) (3)s. It was intended to be a list of replaced employees. However, as it stands, it is in error, so as the case develops it will become apparent there are some corrections on this list, and also that there are other 8(a) (3)s.

The second matter, I refer to Paragraph 4 of the Complaint: "From on or about March 1st to on or about June 24, 1959, employees of the Respondent employed at its Erie facilities engaged in a strike".

The printing is in error there. The strike commenced on March 31st and should be so corrected.

Trial Examiner: I think that is pointed out in the Answer, isn't it?

Mr. Wayman: Yes.

Mr. Fleischut: Yes, that's right. The next matter is in Paragraph 8 of the Complaint. It is alleged there is an unfair labor practice and refusal to bargain commencing May 1, 1959, and that should be April 1, 1959. [18] In Paragraph 6, the third line, "has been", inserted there should be "at all times appropriate thereto and is now".

I move the Complaint be so amended in this regard.

Trial Examiner: Any objection, Mr. Wayman?

Offers of Counsel.

Mr. Wayman: I think perhaps the General Counsel —I suppose any party at the close of the testimony could move to correct his pleadings to conform to the testimony that is developed. I have no objection to any of these changes with the exception of the change in Paragraph 8, which does take me a little by surprise, the reason being I had understood the General Counsel's position was this was an economic strike at its inception but at some subsequent time it changed to an unfair labor practice strike. I want to think about that one a little bit to see if I'm surprised enough to do anything about it, but that does come as sort of a mild surprise.

Trial Examiner: I will grant the motion to amend paragraph 4 and paragraph 6 in the language stated, and your Answer may be amended to include a denial or clarify your position in respect to those two paragraphs as amended, and I will withhold any ruling on the amendment to Paragraph 8 until you consider it.

Mr. Waymans I'd like to consider that a little further because that does change the substance.

Before we begin the testimony perhaps I should clear up [19] this matter of the withdrawn charge by reading a letter addressed to Erie Resistor Corporation by Mr. Shore. It evidently concerns the Charge in Case Number 6-CA-1751, and the letter is Dated August 25, 1959, and reads as follows: "Gentlemen: This is to advise you that Charge filed in 6-CA-1751 has, with my approval, been withdrawn. However, please note that the entire charge in case 6-CA-1790, which also includes the same allegations as those set forth in 6-CA-1751 remains pending. Very truly yours, Henry Shore, Regional Director."

Offers of Counsel.

I think perhaps that clears up one point that is not clear to me.

Trial Examiner: Very well, the record may so show.

Mr. Fleischut: And will the record indicate the formal documents are admitted and not subject to any objection?

Mr. Wayman: I have no objection to the admission of these documents, with this explanation.

Trial Examiner: All right, the record will so show.

Mr. Fleischut: I believe it is appropriate at this time to offer an opening statement in which I will endeavor to frame the issues, and I shall do this by reference to the Complaint and the Pleadings.

Paragraph 4 of the Complaint alleges a strike, and, as amended, the Complaint and Respondent's Answer I believe are identical in admitting that such a strike occurred, with [20] the exception the General Counsel alleges on or about June 24th the strike ended, in 1959, and the Respondent makes reference to the date of June 25th, so I find no issue with regard to the allegations in Paragraph 4 of the Complaint.

Paragraph 5 of the Complaint alleges a unit appropriate for bargaining, and we here embark upon the four traditional paragraphs of the 8(a)(5) violation, and although the unit, as alleged as appropriate, is not directly admitted in the responsive pleadings. I submit that the stipulation clarifies this issue. We had a certified unit which is still used by the parties, but, as the stipulation indicates, matrons have been deleted, by contract usage, from the exclusions because there are no longer any matrons, and, secondly, the parties have

Offers of Counsel.

rearranged the words in the not-traditional fashion of the Board. However, the stipulation indicates the unit is the same and the unit bargained for is that alleged in the Complaint here, with the statutory exclusions, "guards, professional employees and supervisors as defined in the Act." So there apparently is no issue as to the appropriateness of the unit.

Now, Paragraph 6 alleges a majority designation, and Paragraph 7 alleges a demand for bargaining. The demand for bargaining is not in issue because of the stipulation which refers to its closing paragraphs—the exchange of letters on January 26th and January 30th of 1959, where there is a demand [21] for bargaining.

Now, Paragraph 8 of the Complaint alleges a refusal to bargain. There are six sub paragraphs specifically setting forth acts of refusal to bargain in good faith. I do not believe they need more elaboration at this time. They are quite specific.

Paragraph 9 of the Complaint alleges the promulgation of a seniority policy which deprived employees of their seniority status.

The Trial Examiner may note that the motivation for this seniority policy is not alleged in Paragraph 9. The reason is that this paragraph is directed towards what is referred to as the *per se* super-seniority docket, Potlatch Forest, an early Board case.

I might add this allegation of the complaint is included specifically at the direction of the General Counsel, which wants to bring this doctrine before the National Labor Relations Board for review. It is the only case in which the *per se* doctrine has been exposed to a ruling.

Offers of Counsel.

Paragraph 10 of the Complaint deals with the seniority policy, super-seniority, as frequently referred to in the hearing, and alleges that it was discriminatorily motivated.

Paragraph 11 of the Complaint alleges the conversion from an economic to an unfair labor practice strike on or about May 11, 1959.

[22] Paragraph 12 of the Complaint alleges an unconditional offer on the part of striking employees to return to their former or substantially equivalent positions of employment.

Paragraph 13 alleges a refusal to re-instate said employees, and it refers specifically to those in Schedule "A", and the list of names is not all-inclusive, as previously indicated.

Paragraph 14 makes reference to others other employees who suffered discrimination as a result of this policy. These names are not known. They may develop in the course of the hearing. The names themselves might be more appropriately brought up in a back-pay hearing, if necessary, at the compliance stage, if that is required.

Paragraph 14, the purpose of Paragraph 14 is to indicate there is another group of employees who have suffered discrimination by virtue of the seniority policy.

The remaining paragraphs of the Complaint are traditional conclusionary paragraphs.

Trial Examiner: There is no independent 8(a)(1) allegation, is there?

Offers of Counsel.

Mr. Fleischut: No, there is not. The parties have a long history of bargaining, as is indicated in the stipulation.

Trial Examiner: Do you want to make a statement, Mr. Wayman?

Mr. Wayman: I would like to reserve my statement, if I [23] make an opening statement, until I have heard the General Counsel's case.

I would remark, however, I am still puzzled by the proposition which changes this date from May 1st to April 1st, because—as I think the Complaint indicates—it says there was a conversion of the strike. It does not say it was an unfair labor practice strike from its inception.

Trial Examiner: What do you have to say about that, Mr. Fleischut?

Mr. Fleischut: The date of May 1st, as it appears in Paragraph 8, is a typographical error. It was meant to be May 11th, as consistent with the date of the conversion alleged in Paragraph 11.

Mr. Wayman: I could agree with that, all right.

Mr. Fleischut: I merely said April 1st to make it an inclusive period of time, but, as indicated, it was May 11th. I do not propose to prove that on April 1st it became—the refusal to bargain commenced on April 1st—but at times about and after that period of time. We do not expect to prove—nor will I argue—this was an unfair labor practice strike from April 1st. However, there are certain events that occurred prior to May 11th, and you notice the Complaint says on or about May 11th,

Offers of Counsel.

where it might be said the unfair labor practice and the bargaining picked up momentum. There are incidents which occurred, and I think April 1st is a more [24] conservative date, because if I say on or about May 11th, and there occurred something on May 10th or some date prior thereto, there may be some question.

Mr. Wayman: It is not only a conservative date, but it is a mighty misleading one to me. I have to know, before I start this case, whether or not it is alleged this was an unfair labor practice strike or an economic strike on April 1st, and from then up to some time—the Complaint says May 11th—fine. You can say any date you want, but I don't think you can say April 1st because then we attack the thing in an entirely different way. If this is an economic strike in its inception, that's one thing; and, if it is an unfair labor practice strike in your view in its inception, then I have a different problem. I think I must know these things before we go ahead.

Mr. Fleischut: I am stating I'm not alleging an unfair labor practice strike in the inception. Rather, April 1st is used as an inclusive date.

Trial Examiner: You mean for some background evidence?

Mr. Fleischut: That's right.

Trial Examiner: Well, under the circumstances, I certainly think you should withdraw—in view of your statement—you should withdraw your motion for leave to amend paragraph 8 to change it to April 1, 1959 rather than May 1st, because actually you state the date was subsequent to May 1st rather [25] than prior to it. I don't think that would affect you putting in testimony

Offers of Counsel.

that might shed some light on events that happened in the past or the many sins that have been committed under that procedure.

Mr. Wayman: With some correction later.

Trial Examiner: I would be inclined to deny your motion, but actually in view of your statement I don't think I should even be required to rule on it because you have just stated you are not pressing April 1, 1959 as the refusal-to-bargain date or that the strike became an unfair labor practice strike.

Mr. Fleischut: Will you give me a moment to consult with the union's counsel and perhaps we can straighten the matter out.

Trial Examiner: All right, go ahead.

Mr. Fleischut: Regarding the amendment to Paragraph 8, I will withdraw it, and leave it at May 1st.

Trial Examiner: Very well.

Mr. Fleischut: Subject, of course, to a motion at the end to conform the pleadings to the proof. But I will make it, the understanding, I do not allege it was an unfair labor practice strike in its inception, and so, as I understand, it remains at May 1st.

Trial Examiner: Now, with respect to your statement it remains at May 1st, and maybe at the conclusion of your case you will want to amend it, actually I only limit that motion to strictly matters of form and not matters of substance.

[26] *Mr. Wayman:* I was about to suggest that, but I am pretty sure Mr. Fleischut has made it abundantly plain he is not going to claim a change in substance here.

Offers of Counsel.

Mr. Fleischut: That's right.

Trial Examiner: I am convinced of that, too.

Mr. Fleischut: However, a moment to consider—thoughts bring new ideas, and we have another amendment to offer. This is with reference to Paragraph 14 of the Complaint, "Respondent has, since on or about June 24, 1959, discriminatorily laid off"—and I would add here "and otherwise discriminated against" — "divers employees."

Now, the reason why it becomes necessary to add "and otherwise discriminated against divers employees" is because of this; and I will explain it.

As a result of the super-seniority policy, almost everybody, I think—with practically universal application—every employee of this company has been affected, because, in affecting one person's seniority it has affected the relative seniority of everyone.

Now, read literally, Paragraph 14, as it is framed, refers to people who have been laid off. Paragraph 13, of course, refers to those who have been replaced; but there is another group of employees, and that's why I add "and otherwise discriminated against divers employees", because it is believed that there are employees who may have been bumped from a high-paying job [27] classification to a low-paying job classification, and have never been laid off.

Thus, as I view it, literally read, either Paragraph 13 or 14 of the Complaint would cover that. However, let me make it clear we seek in this Complaint to remedy all situations which arise out of the seniority policy, and I don't believe we are adding anything new here. We are

Offers of Counsel.

attacking a seniority policy. If it be found discriminatory then we look for a remedy to correct it in all respects, and I believe the addition of "otherwise discriminated against" covers those employees who may have bumped from one paying classification to another paying classification, or in some other manner—that is not apparent at this time—may have been discriminated against as a result of the seniority policy. I offer such amendment.

Mr. Wayman: I am afraid I will have to object to that amendment for the simple reason while we know there were some employees laid off as a result of our seniority policy, we can't imagine any other action that could have been taken, and I think the Complaint saying "we accuse you of this, just in case you might have done something—while we don't know what it is—but maybe you might have done something," that is not a good complaint. I don't think that is a proper amendment.

Trial Examiner: I think it does enlarge a great deal upon the complaint, and particularly in view of what counsel stated might develop, that he may have instances where employes were [28] bumped from a higher-paying job to a lower-paying job. Apparently he is waiting to see what evidence develops along that line. I will grant the motion, subject to this: That if the evidence reveals any such discrimination I will give you an opportunity to prepare your case along those lines, and grant a continuance, if necessary.

Mr. Wayman: Thank you, sir.

Trial Examiner: I think it will enlarge the Complaint a great deal.

Gordon D. Ferrell—Direct.

Mr. Wayman: Potentially it does. We don't know what that might be. It is sort of a shot-in-the-dark thing.

Trial Examiner: Kind of playing it across the board.

Mr. Fleischut: I believe we are ready to call our first witness.

* * * * *

[29] *Mr. Fleischut:* As the Government's initial witness, I would like to call Mr. Ferrell under rule 43-B.

Trial Examiner: Mr. Ferrell?

GORDON D. FERRELL, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Mr. Wayman: If the Trial Examiner please,—

Trial Examiner: Can you wait just a moment?

Mr. Wayman: Excuse me.

Trial Examiner: State your name for the record.

The Witness: Gordon D. Ferrell.

Trial Examiner: Where do you live, Mr. Ferrell?

The Witness: 3720 Meadow Drive, Erie, Pennsylvania.

DIRECT EXAMINATION

- Q. (By Mr. Fleischut) Where are you employed, Mr. Ferrell?
- A. Erie Resistor Company.
- Q. In what capacity?
- A. Director of Industrial Relations.

Gordon D. Ferrell—Direct.

- Q. How long have you held that position?
- A. Since 1956. I was personnel director before that, in 1953.
- Q. Before that were you employed by the company?
- [30] A. Yes.
- Q. Who was the chief company negotiator during the 1959 contract negotiations, including Resistor and the IUE, Local 613?
- A. I was.

Mr. Wayman: If the Trial Examiner please, I should like to interpose an objection to calling the witness under this rule, since he is neither an officer nor a director of Erie Resistor Corporation.

Trial Examiner: What do you have to say?

Mr. Fleischut: It is quite obvious from the gentlemen's qualifications that he is a managing agent of the company because of the position he holds as Director of Industrial Relations, and it is tradition that such a person be examined under Rule 43-B.

Trial Examiner: I must disagree with you there. I think the term "managing agent", as used in the rule, does not mean anyone who happens to act as an agent, but, rather, one for the purpose of service of process, and in order to establish that the company is doing business in that particular area. I know there is some authority—I think it is the Garfunkel Case—which holds it was not prejudicial error to permit an agent of the company, who was not an officer or director or managing agent, to be called under Rule 43-B—I am not too certain of the authority—to call a person who is a director of

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Industrial Relations or Plant Manager or Superintendent.

- [31] *Mr. Fleischut:* Rule 43-B also encompasses a hostile witness. I think, from his qualifications as chief company negotiator, in a case where the company is the respondent, the Examiner may have no difficulty in coming to a conclusion this witness's interests are hostile to those of the Government.

Trial Examiner: I don't think that follows, per se, no, I think if it develops he is a hostile witness then you may interrogate him under rule 43-B. I don't think this witness qualifies as an officer, agent or director within the meaning of Rule 43-B.

Mr. Fleischut: However, he is a principal agent for these purposes, and I submit as such we should be able to examine him under 43-B.

Trial Examiner: Actually Rule 43-B doesn't say anything about "principal agent". It says "managing agent".

Mr. Fleischut: He is the Manager of Industrial Relations.

Trial Examiner: In my opinion the rule was never written with that in mind. A managing agent is one who is in an area for the purpose of service of process on a corporation or a non-resident partnership doing business there as distinguished from a company that is established there and has officers and directors and can be served, and does not apply to anyone who happens to be working for the company in the top or a responsible position. I may be wrong in it, but that's going [32] to be my ruling.

I find he is not qualified under Rule 43-B as an officer, agent or managing director.

Q. (*By Mr. Fleischut*) What are your duties as director of Industrial Relations?

A. My duties as director of Industrial Relations are to oversee the personnel activities of the company. This means the employment, the keeping of personnel records, the training and development programs that the company has, the first-aid facilities of the company, the testing facilities in connection with the employment, and the industrial relations, which includes the negotiation of contracts and processing of grievances.

Q. In all labor matters, matters of labor relations?

A. Yes.

Q. Who is the immediate supervisor of the personnel director?

A. The vice president of operations.

Q. I am referring to Mr. Bertone.

A. I'm sorry.

Q. What is Mr. Bertone's position with the company?

A. Mr. Bertone is an administrative specialist in my office.

Q. Are you his supervisor?

A. Yes.

Q. May I take it within the purview of your office you are responsible for and aware of personnel policies?

Is that correct?

A. That is correct.

[33] Q. You are aware of the policies and actions of the company in its personnel department regarding the events of the 1959 strike?

A. Yes.

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- Q. How long have you had a bargaining relationship—and by "you" I mean Resistor—with IUE, Local 613?
- A. Since 1951.
- Q. Are you familiar with that contract?
- A. With the first contract?
- Q. Yes.
- A. Yes.
- Q. Are you familiar with the contract which expired March 31, 1959?
- A. Yes.
- Q. Did that contract have a union security clause in it?
- A. Yes, it did.
- Q. What type of a union security clause was that?
- A. Union shop.

Mr. Wayman: May I object at this point, if the Trial Examiner please, and suggest the best evidence of what the contract contained would be the contract itself, and I think we probably intend to introduce it, anyhow, and perhaps it might be a good thing to do at this point.

Mr. Fleischut: I have one more question along this line.

Trial Examiner: All right, go ahead.

- [34] Q. (By Mr. Fleischut) Do you—to your knowledge, in March of 1959 were all employees in the bargaining unit members of Local 613, IUE?
- A. Yes, they were.
- Q. Mr. Ferrell, a subpoena was issued to you to bring certain documents with you. Do you have them at this time?
- A. Yes.

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- Q. You were asked to bring with you a list of all of the employees who were replaced during the strike of April 1 to June 25, 1959. Do you have such a list?
- A. Yes, I have a list by replacement date and a list by seniority date.

Mr. Wayman: May we go off the record?

Trial Examiner: All right, off the record.

(Discussion off the record.)

Trial Examiner: On the record.

- Q. (By Mr. Fleischut) The first thing requested, Mr. Ferrell, was a list of all employees replaced during the strike, indicating the dates of the replacements. Do you have such a list?
- A. Yes.
- Q. This will be indicated as General Counsel's Exhibit Number 3.

Mr. Wayman: I think you said there were two papers. You had to read the two papers, rather than just one.

The Witness: Yes.

- [35] [35] *Mr. Fleischut:* I'm referring to the list indicating dates of replacement.

Mr. Wayman: There will be two lists which, read together, answer your first proposition under subpoena.

Mr. Fleischut: That is correct.

Mr. Wayman: Two papers that are going to be General Counsel's Exhibit 3?

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Trial Examiner: Do you want to designate those as 3(a) and 3(b)?

Mr. Fleischut: I'd rather have them as 3 and 4 because they are separate lists.

- Q. (By Mr. Fleischut) You were also asked to bring a listing of replaced employees by their seniority dates, is that correct?
- A. Correct.

(Thereupon, a document was marked General Counsel's Exhibit No. 3 for identification.)

Mr. Fleischut: And this will be marked as General Counsel's Exhibit Number 4.

(Thereupon, a document was marked General Counsel's Exhibit No. 4 for identification.)

- Q. (By Mr. Fleischut) And a list of all employees laid off since the conclusion of the subject strike?
- A. This is one we did not have readily available. We got your paper on Friday, and we're having this list made up and we will submit it.
- [36] Q. You were asked to bring all newspaper, magazine and news media advertisements published by Erie Resistor during the strike. Do you have those documents?
- A. This is a combination of items 3 and 4.

Mr. Wayman: By the way of explanation, we are a little bit unable to distinguish between news releases and newspaper advertising — advertisements, articles, whatever you want to call them—so they are all in one pile of papers.

Trial Examiner: All right. I see.

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Mr. Fleischut: Let us mark them General Counsel's Exhibit 5 and refer to the individual sheets by the letters.

(Thereupon, a document was marked General Counsel's Exhibit No. 5 for identification.)

- Q. (*By Mr. Fleischut*) You were asked to bring Erie Resistor Corporation's two-page letter of June 5, 1959, signed by President G. Richard Fryling, to all employee members of Local 613. Do you have that?

Mr. Fleischut: This will be indicated as General Counsel's Exhibit Number 6.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 6 for identification.)

Mr. Wayman: Mr. Ferrell, whenever you have the papers asked for, if you would say "Here it is" it would be better.

- Q. (*By Mr. Fleischut*) Erie Resistor Corporation letter of [37] one page, May 3, 1959, signed by President Fryling.

A. Yes.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 7 for identification.)

- Q. (*By Mr. Fleischut*) A collective bargaining contract between the corporation and the union terminating March 31, 1959.

A. Yes.

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Mr. Fleischut: General Counsel's Exhibit Number 8.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 8 for identification.)

Q. (*By Mr. Fleischut*) Local 613, IUE's letter of January 26, 1959, requesting the company to bargain, signed by the president of the union, Edward Bordonaro. I believe you have only the original of that?

A. Yes.

Mr. Fleischut: General Counsel's Exhibit Number 9.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 9 for identification.)

Q. (*By Mr. Fleischut*) The collective bargaining contract effective July 17, '59 to March 31, '60?

A. Yes.

Mr. Fleischut: Two copies of that. General Counsel's [38] Exhibit 10.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 10 for identification.)

Q. (*By Mr. Fleischut*) The "Company's Proposal" dated June 25, '59, with a one-page covering statement commencing "We hand you herewith the Company's proposal of June 25, 1959."

A. Yes.

Mr. Fleischut: General Counsel's Exhibit Number 11.

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(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 11 for identification.)

- Q. (*By Mr. Fleischut*) Erie Resistor Corporation's "Replacement Policy and Procedure", dated May 27, 1959.
- A. Yes, Here you are.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 12 for identification.)

- Q. (*By Mr. Fleischut*) Erie Resistor Corporation's amendment to Replacement Policy and Procedure? June 15, 1959. With a statement of qualifications attached.
- A. Will you clarify that statement of qualifications? We could find no paper attached referred to as a statement of qualifications. I don't know what paper you are referring to.
- Q. In the nature of a job application form, a series of lines and blocked areas.
- [39] A. This I do not have with me. We don't know what you meant.
- Q. You understand now?
- A. I understand now.
- Q. Let's put in that part of the exhibit which you do have, and it will be designated as General Counsel's Exhibit 13.

(The document above referred to was marked General Counsel's Exhibit No. 13 for identification.)

Mr. Wayman: We have found that paper you were talking about. We didn't know what it was

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You had better let Mr. Ferrell see it to make sure it is the right one. Just don't shake your head. If it's the right one say "yes".

The Witness: Yes.

- Q. (By Mr. Fleischut) Mr. Ferrell, I understand this was attached to General Exhibit 13?
- A. I do not recall.

Mr. Fleischut: Let us number it, then—let the statement of qualifications, now putting one copy in evidence, be indicated as General Counsel's Exhibit 13(a), indicating it is a separate document.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 13(a) for identification.)

- Q. (By Mr. Fleischut) A telegram of June 25th from the Union President, Bordonaro, to the corporation. I believe you [40] have the original of that?
- A. Yes.

(Thereupon, the document above referred to was marked general counsel's exhibit No. 14, for identification.)

- Q. (By Mr. Fleischut) Erie Resistor Corporation's telegram of June 25th. You probably only have a copy of that.
- A. This is a message from which the document was sent.

(Thereupon, the document above referred to was marked general counsel's exhibit No. 15, for identification.)

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- Q. (By Mr. Fleischut) The next item is the union's second telegram of the same date, June 25th. Do you have the original?
- A. Yes, here it is.

(Thereupon, the document above referred to was marked general counsel's exhibit No. 16 for identification.)

- Q. (By Mr. Fleischut) Contract agreement regarding section 11, initialed June 5, 1959.

Mr. Wayman: Excuse me, Mr. Trial Examiner, I don't have any objection to producing this paper but I don't like to characterize it "contract agreement" because I'm not quite sure what that means. If we do have a paper Mr. Ferrell can identify, then we have no objection to producing the paper itself.

Trial Examiner: All right.

- Q. (By Mr. Fleischut) Do you have it? If I can see it we [41] will give it a new title.

Mr. Wayman: Sure.

The Witness: Here it is.

Mr. Fleischut: This paper is entitled "Section 11, Upgrade and Transfer", and let the record indicate that's what General Counsel's Exhibit 17 is. Will that be satisfactory, Mr. Wayman?

Mr. Wayman: Surely.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 17 for identification.)

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Mr. Wayman: That was initialed June 5th, I believe it is, as shows on the paper.

Q. (*By Mr. Fleischut*) Number 18, Section 13, Departmental Reduction of Force and Layoff.

A. Yes, here it is.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 18 for identification.)

Q. (*By Mr. Fleischut*) Section 15, Division of Remaining Work, Et cetera.

A. Yes, here it is.

Mr. Fleischut: Number 19.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 19 for identification.)

Q. (*By Mr. Fleischut*) The next paper is entitled, I believe, [42] "Agreements Reached".

A. Yes, here it is.

Mr. Fleischut: Number 20.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 20 for identification.)

Q. (*By Mr. Fleischut*) The Corporation's policy statement, entitled "Recalled to work after strike". It is undated, but I believe it was about May 28th of '59.

A. This is another document which we do not know what you refer to and were not able to find anything with that type of title or heading on it.

Mr. Fleischut: I will identify it later, further identify it.

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- Q. (*By Mr. Fleischut*) Now, all recorded telephonic news releases made by the corporation between May 6th and June 25th.
- A. Here they are, but they are in single and not in duplicate. We didn't have a chance to duplicate them. These are our only copies, so Mr. Wayman may want these back to make duplicates.

(Thereupon, the documents above referred to were marked General Counsel's Exhibit No. 21 for identification.)

- Q. (*By Mr. Fleischut*) Statement of Company's position.
- A. Yes.

Mr. Fleischut: Number 22.

- [43] (Thereupon, the document above referred to was marked General Counsel's Exhibit No. 22 for identification.)
- Q. (*By Mr. Fleischut*) A two-page letter signed by President Fryling, of April 17th, to "All Erie Resistor Employees"
- A. Yes, here it is.

Mr. Fleischut: Exhibit Number 23.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 23 for identification.)

- Q. (*By Mr. Fleischut*) A two-page letter of May 29th to All Employees.
- A. Mr. Fleischut, we have no letter of May 29th. There was a letter of April 29th. If this is the one you mean, I have it, but we have no letter of May 29th.

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Q. May I see it?

A. Yes.

Mr. Fleischut: Yes.

Mr. Wayman: Yes what, Mr. Fleischut?

Mr. Fleischut: Yes, that is the document I was looking for. I am sorry. That will be marked Exhibit Number 24 of the General Counsel.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 24 for identification.)

Q. (By *Mr. Fleischut*) A one-page letter of May 14th to members [44] of Local 613, IUE.

A. Yes, I have that.

Mr. Fleischut: Number 25.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 25 for identification.)

Q. (Mr. Fleischut) A letter of May 19th to all members of Local 613, IUE:

A. Yes, here it is.

Mr. Fleischut: Number 26.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 26 for identification.)

Q. (By *Mr. Fleischut*) A strike settlement agreement of July 17, '59.

A. Yes, here it is.

Mr. Fleischut: Number 27.

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(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 27 for identification.)

Q. (*By Mr. Fleischut*) Number 28, the Maintenance-of-Membership, dated August 11, "60", with an attached resignation form.

A. Yes, here it is.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 28 for identification.)

[45] Q. (*By Mr. Fleischut*) Number 29. Corporation's list of people permanently replaced, dated June 26th.

A. Yes, here it is.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 29 for identification.)

Q. (*By Mr. Fleischut*) A list of people permanently replaced dated July 6th.

A. Yes, here it is.

Mr. Fleischut: Number 30.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 30 for identification.)

Q. (*By Mr. Fleischut*) Number 31, a list of people permanently replaced dated August 18th.

A. Yes.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 31 for identification.)

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- Q. (*By Mr. Fleischut*) Number 32, a list of replaced employees, indicating their job and department number, name of replacement employee, date of replacement, and the date the replaced employee applied for reinstatement. I also asked for the address of the replacing employee.

Mr. Wayman: Now, if the Trial Examiner please, we have told Mr. Fleischut we don't have the addresses of these employees [46] on any list, and we prefer not to give them the addresses of the replacements since they can't possibly be of any relevance or use in this case. I don't know how Mr. Fleischut feels about the addresses, but we labored pretty hard to get him a lot of paper already, and we think this is some paper he doesn't really need.

Trial Examiner: You want the address of each of the replacement employees?

Mr. Fleischut: The replacing or replacement employees, I would like to have. I am not waiving that at this time. I believe it is important, and perhaps I must subpoena these.

Mr. Wayman: This is something that could be determined in the course of the investigation. I think it is not a very proper time to determine that at a date set for the hearing. There have been months and months in which that could have been done if it was necessary.

We are under the apprehension now, I think for some cause, as our own case will show, that the addresses of these people might be used for the pur-

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pose of harassing and troubling them. We underwent a good deal of difficulty in the course of this strike, and we are certainly not interested in subjecting them or making it possible for anyone to subject them to any more of these difficulties."

Mr. Fleischut: You are not suggesting that government counsel would harass the employees, are you?

[47] *Mr. Wayman:* As far as I know, Mr. Fleischut, no Government counsel would harass these employees except, perhaps, with questions they would not like to answer. But I can't see any possible use for these addresses, and I do think if it were for the purpose of subpoenaing them as witnesses this is something that could have been done in the course of a long investigation.

Trial Examiner: When did you request this information on the names and addresses of the replacing employees?

Mr. Fleischut: The subpoena was issued last week.

Mr. Wayman: The subpoena was handed to the company on Friday morning at a time at which Mr. Ferrell was in my office getting other papers together. He wasn't even in his office on Friday morning. We were working, getting this together, which I think Mr. Ferrell has done with a good deal of good nature, maybe more than I would have displayed had I been called on to do it over the weekend. It had to be done on Saturday and Sunday.

Mr. Fleischut: As the Trial Examiner may be aware, the Government does not make a practice of

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using pre-hearing subpoenas and thus this information—for all practical purposes—is placed beyond our reach.

Mr. Wayman: There was no suggestion and certainly no evidence the General Counsel couldn't have gotten this, if he wanted it, before the hearing.

[48] *Trial Examiner:* I don't think there is any question before me now as to compliance with that phase of the subpoena. If the company feels the information is unnecessary and immaterial to the issues here, and you feel that it is,—well, during the course of the hearing it may develop that you need a subpoena, and if the problem comes up now, all right. Right now I don't see there is anything before me other than you are right now taking in many exhibits by way of stipulation.

- Q. (*By Mr. Fleischut*) Mr. Ferrell, you have the rest of this matter requested in Item 32, is that correct?
A. I have one copy of it, however, instead of two. We can get you another one.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 32 for identification.)

- Q. (*By Mr. Fleischut*) Number 33, I have asked for the names and addresses of all temporary employees hired during the strike, and the positions held. Anticipating the same objection, I will save words by saying I understand the company has not brought the addresses, and if we may apply the same rules to this exhibit I will otherwise accept what we have.

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Mr. Wayman: We have the additional difficulty, Mr. Fleischut, we aren't able to tell what positions the temporary replacements held. In other words, as I understand it, they were [49] used as sort of a floating labor pool.

We do have a list of names, which is the best we could do, and when they were put on and what happened to them, when they left. That is about as close as we could come to that. Anything more would have to be developed by testimony, I think.

Trial Examiner: All right.

Mr. Fleischut: Let this be marked General Counsel's Exhibit Number 33.

The Witness: I will say yes, here it is.

(Thereupon, the document was marked General Counsel's Exhibit No. 33 for identification.)

- Q. (*By Mr. Fleischut*) Do you have some others there for me?
A. That is the end of the list.

Mr. Wayman: Gordon, you must speak up when you are talking to Mr. Fleischut, just as when Mr. Fleischut is talking to you, because otherwise the reporter can't hear you.

- Q. (*By Mr. Fleischut*) Mr. Ferrell, with regard to General Counsel's Exhibit Number 3, that was the document that had the listing of the employees—

Trial Examiner: Do you want to offer all of these exhibits in evidence?

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Mr. Fleischut: I was going to proceed upon having the witness identify these matters, describe the circumstances and background about which it came about. Naturally, he will not testify as to the contents, but he will explain for [50] us the background of each of them. The procedure I had planned upon using was that, and then offer them all in evidence.

Trial Examiner: My understanding, many of them there is no dispute about.

Mr. Wayman: We have no objection to putting any of these papers in that we have produced, in evidence, and, as far as we know, they are genuine papers. We think they are.

Mr. Fleischut: It still becomes important, however, to explain the subject matter or the origin of each one.

Trial Examiner: I think he can do that.

Mr. Fleischut: Do you want me to put them in evidence first?

Trial Examiner: I think we might as well wholesale them in evidence, and then—you should be referring, in fact, to the documents as marked for identification now, but, if you are going to proceed on an individual theory, I think—since there is no objection to the documents themselves—they have been produced by the company—why not receive them in evidence, and then if you want to conduct any examination on them you may do so.

Mr. Fleischut: All right, I now offer into evidence General Counsel's Exhibits 3 through 33.

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Mr. Wayman: I have no objection.

Mr. Davidson: No objection.

[51] *Trial Examiner:* All right, the documents may be received in evidence and marked as General Counsel's Exhibit 3 through 33.

(The documents heretofore marked General Counsel's Exhibits 3 through 13, 13(a), and 14 through 33 for identification were received in evidence.)

Q. (*By Mr. Fleischut*) Mr. Ferrell, would you examine General Counsel's Exhibit Number 3? What is General Counsel's Exhibit Number 3?

A. This is a list of replaced employees, in order, by replacement date.

Q. And the date appearing to the right of each name indicates what?

A. The date on which the employee was replaced.

Q. During the strike, is that correct?

A. That is correct.

Q. And General Counsel's Exhibit Number 4, would you examine that document? What is General Counsel's Exhibit Number 4?

A. This is a list of the same replaced employees, arranged in order by seniority date.

Q. The date appears to the right of the name, is that correct?

A. That is correct.

Q. That is the employee's true or actual earned seniority, is that correct?

[52] A. This is their actual seniority date with the company, yes.

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- Q. The beginning of their current employment with the company, is that correct? And by the word "current" I don't mean to deceive you. I understand the employer considers they are no longer employees, but as of the date of replacement, that is the beginning date of their calculation of seniority, is that correct?
- A. If none of these employees lost seniority due to leave of absence in which seniority did not accumulate, in which case the seniority would have been adjusted, then this date is exactly either their date of employment or their adjusted seniority date. It is the date that was on the seniority list as of March 31, 1959.
- Q. In the ordinary course of matters what things would that date be used for?
- A. This date would be used to determine the selection of an employee when several of them would bid on a job in which they were both qualified, and the senior employee would be entitled to the job. It would be used in reduction of force where an employee was no longer needed on their job, and it would be used to bump another employee with lesser seniority. It would be used to determine the amount of vacation to which an employee might be entitled in any one year. It would also be used in determining the length of service with the company in connection with the retirements and the pension plan. Those [52] are the major things the seniority would be used for.
- Q. Did your list include bumping, bidding and layoff?
- A. I beg your pardon?
- Q. The seniority date is used for layoff purposes, is that correct?

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- A. Yes, I said in reduction of force it determines who the employee could bump, and it follows if there is no one they could bump they then would go on layoff, and the seniority date would be used to recall them from layoff.
- Q. General Counsel's Exhibit Number 5—excuse me—strike that. I had asked for a list of all employees laid off since the conclusion of the above strike, and you said you did not have that with you, is that correct?
- A. That is correct.
- Q. Did you tell me you were compiling that list?
- A. Yes, we are.
- Q. You had not previously compiled it?
- A. That's right.
- Q. Now, with reference to General Counsel's Exhibit Number 5, news releases, advertisements and so forth, will you examine that document, please? Perhaps, Mr. Ferrell, you can explain this first sheet to us. "WICU Television Script." What is this?
- A. This is the text of a talk that was made on television over WICU by the president of the company, Mr. Fryling, on [53] April 20, 1959.

Mr. Fleischut: I think it would be well to mark this television script General Counsel's Exhibit 5(a), because there are several items here, if the record may reflect that.

Mr. Wayman: I have no objection that that at all.

Trial Examiner: All right, the script is marked General Counsel's Exhibit 5(a).

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- Q. (*By Mr. Fleischut*) What is the next item?
- A. This is a paid ad which was in the Erie Times paper of May 25, 1959, offering a one-thousand-dollar reward to be paid by the company for information leading to the arrest and conviction of the first person or persons found guilty of secret underhanded assault, vandalism or anonymous threats directed against any presently working Erie Resistor employee.

Mr. Fleischut: Let this be marked 5(b). Mr. Ferrell, it won't be necessary to read the exhibits, as they speak for themselves.

Trial Examiner: He read that in response to your question.

Mr. Fleischut: I asked what it was and how it came about. What it was.

- Q. (*By Mr. Fleischut*) What paper was that published in?
- A. The Erie Times.

(Thereupon, the documents above referred to were marked General Counsel's Exhibits Nos. 5(a) and 5(b) for identification.)

- [54] *Mr. Wayman:* Could we establish at this time the Erie Times is a newspaper of general circulation in the City of Erie?

Mr. Fleischut: It may be so stipulated.

Trial Examiner: The stipulation may be received in evidence.

Mr. Fleischut: It is the only newspaper of general circulation in Erie.

The Witness: Yes.

- Q. (*By Mr. Fleischut*) The next item?
- A. A page ad entitled "Report to the community on the Erie Resistor Strike," that appeared in the Erie Times on Sunday, June 14, 1959.
- Q. Does it purport to set forth the company's position in the strike at that time?
- A. Yes, it does.
- Q. Let us mark that (c); 5(c).

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 5 (c) for identification.)

- Q. (*By Mr. Fleischut*) What is the next item in Exhibit 5, Mr. Ferrell?
- A. The next item is a classified ad that appeared in the Erie Times on June 17, 1959. It was a "Help Wanted" ad for women employees.
- [55] Q. I see two papers mounted together there. Are the both the same day, or perhaps you could distinguish between them.
- A. These two papers, two items, both appeared in the paper on the same day. One is simply a news item, which is not a paid ad by the company. We just happened to have this sheet put together, in chronological order, by dates of the newspaper clippings, and the one that you wanted was the paid ad that happened to be on this sheet.

Mr. Wayman: I'll agree the news item is not part of the exhibit.

Trial Examiner: All right.

Mr. Fleischut: We will consider that as irrelevant and not responsive to the subpoena.

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The second item on the page, the "Women Wanted" ad,—give me the date again, Mr. Ferrell. June 17th?

The Witness: It is right on top of the sheet there.

Mr. Fleischut: Let that be marked 5(d).

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 5(d) for identification.)

Q. (*By Mr. Fleischut*) What is the next one?

A. The next is the text of a news release which was given to the Times news—to the radio and television stations in Erie, on May 23, 1959.

Q. Have you personal knowledge was it broadcast?

[56] A. I do not have personal knowledge, no, sir. I assume it was.

Mr. Fleischut: Let us mark this news release Exhibit 5(e).

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 5(e) for identification.)

Q. (*By Mr. Fleischut*) What is next, sir?

A. The next is another paid advertisement in the Morning News, the morning edition of the Times, on May 21, 1959. This ad gives the telephone number which anyone seeking information about the Erie Resistor Strike could dial in order to get that information.

Q. When they called that number what would occur?

A. There was a recorded message which would be given over the phone in response to the call.

- Q. I see some other items on the page besides that. What are they?
- A. This, again, like the other exhibit, was taken from our chronological record in order of date, and this other item happened to appear on May 21st also.
- Q. But the date of May 21st is the correct date of the advertisement?
- A. That's the correct date of the advertisement, and "Call 6-6221" is the paid ad.

Mr. Fleischut: That will be marked "(g)", 5"(g)." .

[57] (Thereupon, the document above referred to was marked General Counsel's Exhibit No. 5 (f) for identification.)

- Q. (*By Mr. Fleischut*) Are there any other items in Exhibit Number 5?
- A. No, that's all we have.
- Q. There were no other advertisements of any type placed by the company during the strike concerning these matters?
- A. Not to my knowledge. Not to my knowledge.
- Q. Would you have knowledge of such matters?
- A. I had what I thought was a complete file, and these were taken from the file.
- Q. Such knowledge would be in the purview of your office, is that correct?
- A. Yes.
- Q. Had there been any further public releases concerning the merits of the company's position towards an illumination of the facts as you saw them, as the company saw them, concerning the strike, they would have been included, is that correct?
- A. Yes.

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Q. And were there any other ads, advertisements for personnel, that would also be included? They would be included, is that correct?

A. That's correct.

Q. And there were no other ads, is that correct?

A. No other ads.

[58] Q. Let's go on to the next exhibit. The letter of June 10th. Number 6. I note this letter is addressed "to all employees of Erie Resistor Corporation and members of IUE Local 613". What was the circulation list for this letter?

A. This was the circulation list—it included all of the employees of the Erie Resistor who either had been at work on March 31, 1959, who were working at the time the letter was published, or who were on layoff at the time the letter was published.

Q. Were there any other persons included on this mailing list?

A. For this particular letter?

Q. Yes. Any public officials, news media or anything of that type?

A. I would have to say this in response to your question. As the strike progressed a number of people wrote in and asked to be put on the mailing list. Now, who was on that mailing list when this letter of June 10th was sent out, I do not know.

Q. You used this same list throughout the strike, is that correct?

A. Yes.

Q. And the list included employees, replacements, replaced employees, and laid-off employees, is that correct?

A. That's correct.

- Q. Then you also added, did you not, to that list, public [59] officials and news services and so forth?
- A. Interested individuals who asked to be included.
- Q. Did that include news-gathering agencies and persons—radio, newspapers and so forth, television?
- A. I can't answer that.
- Q. Now, the letter of May 3rd, General Counsel's Exhibit Number 7, was that letter circulated by the company on the same list as was the previous letter? That is, the one of June 10th?
- A. Yes.
- Q. The later letter of June 10th?
- A. Yes, it was.
- Q. Now, skipping over the contract, General Counsel's Exhibit Number 8, and directing your attention to General Counsel's Exhibit Number 9, the letter of January 26th, was this letter received by your office?
- A. Yes, it was.
- Q. Let us skip over General Counsel's Exhibit Number 10, and go to General Counsel's Exhibit Number 11. What is General Counsel's Exhibit Number 11?
- A. General Counsel's Exhibit Number 11 is the company's reply to the union's proposals made on June 24th, together with a letter of transmittal which stated "We hand you herewith the Company's proposal of June 25th"—and so on.
- Q. Was this letter given to the union in the course of the [60] negotiations?
- A. Yes, it was.
- Q. General Counsel's Exhibit Number 12, "Replacement Policy and Procedure" of "July" 27th. What is this? Who was it given to, and when?

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- A. General Counsel's Exhibit Number 12 is the replacement policy and procedure statement of the company date *May 27, 1959*, and sets forth in itemized form the manner in which replacements would be made and the manner in which reduction of force would be handled, and recall from layoff would be handled. This is particularly with reference to replacement employees who were to be accorded a twenty-year additive to their regular seniority date.
- Q. Now, was this letter given to the union negotiators? This exhibit?
- A. I do not recall whether this was ever given to the union. This was explained to the union.
- Q. When was this explained to the union?
- A. I can answer your question if you'll let me consult my notes.
- Q. Any time you wish to you may refer to the stipulation, the list of meetings, which is in evidence—for your use—as General Counsel's Exhibit Number 2. And, if you have further notes, I don't mind if you refer to them to refresh your recollection.
- [61] A. I would like to answer your question, but after some fifty-two meetings and two hundred and eighty hours it is a little difficult to pinpoint what happened at a particular day or hour.

Mr. Wayman: I suppose we might have a five-minute break?

Trial Examiner: Yes, we will take a five-minute recess.

(Recess.)

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Trial Examiner: All right, the hearing will be in order. Go ahead, Mr. Fleischut.

Q. (By Mr. Fleischut) When we adjourned, Mr. Ferrell, you were about to consult your notes with reference to the General Counsel's Exhibit Number 12, the replacement policy and procedure of 5/27/59.

A. Right. In answer to your question, the company did discuss the twenty-year super-seniority policy with the union at the meeting they had on the following day, or May 28th. We did not give them a copy of our policy of May 27th.

Q. This matter you discussed, was that the subject matter of the exhibit, General Counsel's Exhibit Number 12, which I referred to? Is that correct?

A. Yes.

Q. That was discussed and explained to the union on the 28th of May, '59?

A. On the 28th of May.

Q. But they were not presented with a copy of it at that time?

[62] A. That's right.

Q. Were they ever presented with a copy of it, if you know?

A. I don't know that they were ever presented with a copy of it.

Q. But it was explained fully at that time?

A. Yes.

Q. Now, was there a time when it was placed into effect? That is, the policy as outlined in General Counsel's Exhibit Number 12?

Mr. Wayman: If the Trial Examiner please, this is objected to as calling for a rather difficult

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legal conclusion, I think. The difficulty has occurred to me also, I might say, as to was the policy placed into effect where the only policy or the only possible effect the policy could have would be after the strike was over. In other words, the people working. In any event, the policy directed to avoiding layoff or replacements couldn't very well be placed into effect. I think, of course, the form of the questions—

Trial Examiner: You gentlemen know more about this case than I do, but, from the form of the question, it seems like he can answer. If the witness can't, I think he can say so.

Mr. Wayman: If he is able to I think that's all right, but I just wanted to point out the difficulty in the wording of the question. I don't know exactly how it was worded.

Trial Examiner: I will overrule the objection, and, the [63] witness on the stand, if he can explain or answer the question and explain it, he may do so. If he can't, he may so state.

The Witness: Will you please restate your question?

- Q. (By Mr. Fleischut) This policy outlined as General Counsel's Exhibit Number 12, which was explained to the Union on May 27th of '59, when did this become policy?
- A. This became policy sometime prior to May 27th. It was written down on May 27th, and explained to the union on May 28th.
- Q. Can you tell us when, prior to May 27th, it became policy?

- A. No, but I can tell you this. That with the beginning of the hiring of replacements—
- Q. What date was that?
- A. The first mention of this in negotiation session was on May the 11th, and at this time we told the union that as replacements came in they were being assured they would not be laid off as a result of the settlement of the strike and because of the large number of employes on layoff, and this meant in order to sandwich these replacements in between and still keep them at work; not be in conflict with the seniority sections of the contract, that we would have to accord them some sort of super-seniority. This was May 11th, at the very beginning, and at that time we didn't know exactly what kind or [64] how we were going to do it, except the problem presented itself and it was evident we were going to have to take care of it in some manner similar to this. It was on May the 27th that enough replacements had been hired, or coming in, we felt we had better put this in writing in order to be sure that everyone was handling it in a uniform manner. This was the reason for reducing this to writing on the 27th. Also on the 28th we explained this to the union, and it appeared employees were going to have to have in the neighborhood of twenty years' seniority following the termination of the strike in order to be able to work, and this is where the twenty years came from. It was developed from the projection of what our work force would be on the basis of our volume of orders which we expected to have following the termination of the strike, so this is how it was developed and how it was arrived at twenty years. Does that answer your question?

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- Q. That covers quite a few questions. That is sufficient.
- A. All right.
- Q. The policy was composed in written form on the 27th, is that right?
- A. That is right.
- Q. Now, who participated in the composition of that document?
- A. Of the formula or the document?
- Q. Let's take them one at a time. Who composed the wording of the document?
- [65] A. I did.
- Q. Now, what is the origin of the policy? With what group? Who?
- A. The origin of the policy was with the members of the company negotiating committee, with the managers of our three divisions, the officers of the company, myself and counsel.
- Q. And although not reduced to writing, it was put into effect on May 11th, is that correct?
- A. No, that is not correct.
- Q. You told me you hired your first replacements on May 11th.
- A. I said it became apparent on May 11th we were going to have to find some way of implementing our policy of assuring replacements that they would not just be temporary replacements and would not be laid off as a result of the termination of the strike.
- Q. You had a problem on May the 11th, is that correct?
- A. We had a problem May the 11th.
- Q. When did you effectuate the solution? When did you solve this problem? You told me that you composed

the document on the 27th and it had been in effect before that time.

Trial Examiner: Actually that wasn't his testimony, that it had been in effect. He said it was mentioned to the union on May 11th, and then, as replacements came in in large numbers, they knew something had to be done, and then the policy was put in writing on May 27th and brought up at the union meeting [66] on May 28th. I think you have been all over that.

- Q. (*By Mr. Fleischut*) I was under the impression you said the policy was put in effect, although not reduced to writing, before May 27th, is that correct?
- A. We knew that some sort of super-seniority policy would have to be developed. We cast around to see what seemed to be the thing we needed to fit the situation, and this is what we finally came up with shortly before the 27th.
- Q. Now, what is "shortly before"? That is my question.
- A. I would say one or two days.
- Q. Now, General Counsel's Exhibit Number 13 is a policy statement of June 15th, I believe.
- A. Yes.
- Q. Would you explain what was done with this piece of paper?
- A. Yes. On June 15th this amendment to the replacement policy and procedure, together with the replacement policy and procedure dated May 27th, was posted on the bulletin boards of the company for the first time, and we explained on this supplement that we were endeavoring to find some answer to this thing, and the best thing we could come up with

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would have been the twenty-year seniority plan, and that unless we were able to negotiate some other plan with the union that this is the one we would follow.

- Q. You posted General Counsel's Exhibits 12 and 13 together, 13 as an amendment to 12, on June 15th, is that correct?

[67] A. Yes, sir.

- Q. Now, was the policy, as amended in the notice of June 15th, put into effect as amended at that time?

A. You will have to define what you mean by "putting into effect."

Mr. Wayman: Again, if the Trial Examiner please, I think Mr. Fleischut is not intending to be unfair at all,—

Trial Examiner: I think I can follow you now

Mr. Wayman: —but the difficulty is, if I remember that paper correctly, there are two things in it. One is a procedure they followed in placing people on jobs, and the other is the so-called twenty-year seniority. You couldn't have any need for super-seniority—or whatever you want to call it—until the strike was over. You say "Put it into effect." That could only be at the end of the strike. But if you're talking about the procedures, that is something else.

Mr. Fleischut: I think I can explain my question.

Mr. Wayman: I'm not suggesting for a moment that you're trying to be unfair with the witness, but—

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Trial Examiner: It is a question of semantics, "putting into effect," instead of "procedures"?

Mr. Wayman: Yes.

- Q. (*By Mr. Fleischut*) I will try to qualify my question. A written piece of paper by itself entitled "Proposal of policy" may be nothing but a proposal. It represents an idea. [68] The second step is that when that becomes an action, becomes policy. I assume you can grasp that distinction.
- A. Yes.
- Q. Now, you have told me with regard to the May 27th policy letter, it became an action a few days before the 27th, and; with regard to the one on the 15th, my question is when did that become an action, and not an idea?

Mr. Wayman: Excuse me. I think I must object to the question there because I don't think it properly characterizes the answer given by the witness to the previous questions. It may be a question of semantics. Maybe it is not important, but I think perhaps it becomes important if you say "When did you put this policy into effect?" You are suggesting the company at some time prior to May 27th had made up its mind "this is it, and nothing more."

Trial Examiner: Could the witness answer when the company adopted or formulated this policy, as distinguished from when the policy was put into effect?

Mr. Wayman: That, I think, the witness could explain. He might have to talk a little bit to do it, but that's why we have witnesses.

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Trial Examiner: This witness understands.

- Q. (By Mr. Fleischut) When was the 6-15 amendment adopted?
- A. You are referring only to the amendment?
- Q. When did you amend the other policy which has already been [69] adopted?
- A. On June 15th.
- Q. And you posted it for all of the employees to see on the bulletin boards, is that correct?
- A. Yes.
- Q. And was 13(a) attached to 13 at that time? General Counsel's Exhibit 13? 13(a), a statement of qualifications?
- A. Yes, it was.
- Q. Now, General Counsel's Exhibit Number 14 is a telegram is that correct?
- A. Yes.
- Q. And the company received that, is that correct, on the date indicated?
- A. The company received this telegram on the 25th.
- Q. And what did the company do in reply to that telegram?
- A. We sent a reply to the union.
- Q. That is General Counsel's Exhibit Number 15, is that correct?
- A. That is correct.
- Q. And following that you received General Counsel's Exhibit Number 16, is that correct?
- A. That is correct.
- Q. Now, General Counsel's Exhibits Number 17, 18 and 19, what are they?
- [70] A. Seventeen, eighteen and nineteen are the agreements reached on Section 11, Section 13, Section 15.

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- Q. Of the contract?
- A. Of the labor agreement.
- Q. And what does the initialling indicate?
- A. This indicates agreement between the company's and the union's committees.
- Q. They agreed on those sections on those dates, is that correct?
- A. Correct.
- Q. Now, with regard to Section 11, General Counsel's Exhibit Number 17, it is initialled two days later than the others.
- A. One day.
- Q. One day. Was that initially agreed upon at another date?

Mr. Wayman: May I hear that question again, please?

The Witness: I'm sorry. I'll have to ask you to clarify that. You're asking me if this paper, exactly as it is, was agreed to at some prior date? If you are, the answer is "no".

- Q. (*By Mr. Fleischut*) Were portions of it agreed to at some time prior to the initialling date?
- A. Again I will have to ask you to clarify the question.
- Q. These three sections contained in General Counsel's Exhibits 17, 18 and 19 were discussed together, is that correct? They all deal generally with the principle of seniority, movement [71] of seniority, is that correct?
- A. Yes.
- Q. They were all agreed upon on June 4th, is that correct?

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- A. All^o except Section 11, which was agreed to on June 5th.
- Q. Excuse me. Let me look at Section 11. I refer you to the fourth line from the bottom. There is an initialed alteration there, and there is also a strike through about the middle of the page.
- A. Yes.
- Q. When were these changes made?
- A. On the 5th.
- Q. And other than the changes, when was it agreed upon?
- A. It was probably discussed on the 11th or on the 4th, the same time the others were discussed, but it was finally approved and agreed on on the 5th.
- Q. All right. General counsel's exhibit number 20, what is that?
- A. This is the summary of the agreement reached on June the 4th.
- Q. General counsel's exhibit number 21, explain please?
- A. General counsel's exhibit number 21 is the text of the recorded messages which were taped and — I won't say dispensed. They were given out over the telephone when they called 6-6221.
- Q. What was the number given out in the newspaper?
- [72] A. Yes.
- Q. Any member of the public that wanted to learn the company's position on the strike could call that number?
- A. Yes.

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- Q. Then general counsel's exhibit number 21, are those messages, is that correct?
- A. That's correct.
- Q. Now I notice on some of these pencil markings at the bottom or on the reverse side of the sheets, are they part of the telephonic messages?
- A. No.
- Q. Are they completely irrelevant and have nothing to do with the messages at all?
- A. I will have to examine them.
- Q. Let's go through them day by day and indicate which corrections are and which are not.
- A. On May the 9th the corrections on the sheet were included in the telephone messages. Notations on the message for May the 11th at the bottom of the page have nothing whatsoever to do with the message. Notations on May 12th were suggested alternate ways of saying some of the things which were included in the message, or that could be added if there was time on the tape. We were limited to a two-minute tape.
- Q. Where they included on the tape?
- A. They were not included unless they were written into [73] the body of the message. The notation on May 14th could have been a second message for that day. Whether it was not, I don't know. The pencil notations on the message for May 14th were included in the message — notations on the message for May 15th were included in the message.
- Q. Please indicate if there are some —
- A. The last paragraph of May 15th may or may not have been included, depending on the length of time

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left on the tape, and I do not know whether it was included or not.

Q. That is the paragraph marked in the brackets, is that correct?

A. That is correct. The notations on the message of May 29th were included in the tapes. The notations on the message of June 16th were included in the tape message.

Q. Indicate or make a comment on that one.

A. On June 4th the notation at the bottom of the page has nothing to do with the message. The notations on the message of June 7th were included. That is the morning message of June 7th. This is also true of the afternoon message on June 7th, the notations were included. June 10th the pencil notations were included in the message. On June 14th the pencil notations were included. On June 16th the pencil notations were included. June 17th the pencil notations were included. On June the 18th the pencil notations may or may not have been included in the message.

[74] Q. That is the word "approximately" instead of "nearly", is that correct?

A. Yes. June 19th the pencil notations were included in the tape message. June 21st pencil notations were included. The message of June 22nd, the pencil notations were included. The message of June 25th the pencil notations were included.

Q. General counsel's exhibit number 22 statement of position of April 8th. What is that?

A. General counsel's exhibit number 22 is a statement of the company's position as was presented in the first meeting with the Federal Mediator meeting

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following the beginning of the strike at which the company's basic objectives and negotiations were set forth, an outline of our business problems was included, and some history of the bargaining which led up to the ~~b~~ through March 31, 1959, and precipitated the strike.

- Q. The statement of position was given to the union negotiating team on that date?
- A. Yes, it was.
- Q. General counsel's exhibit number 23. This is a letter to all employees. Now to whom was it sent?
- A. It was sent to all employees of the Erie Resistor Corporation, including the bargaining people, the salaried people and those who were on strike.
- [75] Q: This is the same distribution list that you referred to before, is that correct?
- A. Correct.
- Q. I understand this included everybody who was employed before the strike, or at the time the letter was written, is that correct?
- A. Yes.
- Q. Whether they were on strike, laid off, rehires, replacements or whatever is that correct?
- A. Yes.
- Q. Anyone who in the most liberal sense of the term might be considered an employee, is that right?
- A. That's right.
- Q. Then the letter of April 29th, general counsel's exhibit 24, to whom was that sent?
- A. Sent to the same group of employees.
- Q. All right. General counsel's exhibit number 25, the letter of May 14th?
- A. This was sent to all members of local 613.

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- Q. That includes the same mailing list as referred to previously?
- A. No, I think there is a distinction between all employees and all members of local 613.
- Q. This were to employees who were members of local 613?
- A. Yes.
- [76] Q. It was mailed to them?
- A. That's right.
- Q. What brought this letter about, what action?

Mr. Wayman: Was the question what brought this letter about, what action?

Mr. Fleischut: What action precipitated the writing of this letter?

Mr. Wayman: I forego objection, but I am a little puzzled myself — what action by whom?

Mr. Fleischut: Why was the letter written?

Trial Examiner: I think that answers your objection. Why was it written?

The Witness: This was written in response to a letter sent to some working employees who had crossed the picket line and signed by the president of the union on behalf of local 613.

- Q. (By Mr. Fleischut) Did you see a copy of that letter?
- A. Yes, I did.
- Q. Would you identify this document which we will mark general counsel's exhibit number 34, for identification.

(Thereupon, a document was marked General counsel's exhibit 34, for identification.)

Q. (By Mr. Fleischut) Can you identify that?

A. Yes, I can.

Q. What was it?

[77] A. It is a letter that I just referred to.

Q. This is the reason you wrote general counsel exhibit number 25, is that correct?

A. This and the reaction from the employees who got it.

Mr. Wayman: I simply note that the name of the person to whom it was evidently addressed, has been cut out, which is all right with us, but I think the record should show there was a name and address that appeared at the usual place.

Q. (By Mr. Fleischut) Mr. Ferrell, can you tell us the circumstances under which this cut out was made in this letter, general counsel's exhibit for identification, number 34?

A. Why was it cut out?

Q. Yes. My question was did you cut this out before giving it to the government so the name would not be identified?

A. Yes, not in fear of the government but so there would be no reprisal against the individual by anybody else.

Mr. Fleischut: I move now the admission in evidence of general counsel's exhibit 34 for identification.

Mr. Wayman: I have no objection.

Trial Examiner: It may be received in evidence and marked as general counsel's exhibit number 34.

(The document heretofore marked general counsel's exhibit 34, for identification, was received in evidence.)

- Q. (By Mr. Fleischut) General counsel exhibit number 26, will you identify that? Was that sent to the mailing list [78] previously described by you?
- A. This letter was sent to all members of local 613.
- Q. By the company?
- A. By the company.
- Q. General counsel exhibit number 27, tell us what that is?
- A. General counsel's exhibit number 27 is the settlement agreement which was signed the same time that the labor agreement was signed which the company and the union agreed to dispose of replacement insurance policy through the procedures of the NLRB and the Federal courts, that it would remain in effect until there was final disposition made.
- Q. Was general counsel's exhibit number 27 signed by the parties at the final negotiating session?
- A. Yes, it was.
- Q. Now general counsel's exhibit number 28. Can you tell us what it is?
- A. Yes.
- Q. This is a notice that was posted on the bulletin board on August 11th, explaining the procedure, the procedure brought about by the change and the section of the contract having to do with the union security clause. We formerly had had a union shop provision and the agreement finally reached on July 17th we settled on a maintenance of mem-

bership provision. This led to some confusion on the part of employees in the plant [79] who came to work immediately following the strike; they didn't understand quite what this meant so the employees who had been working and had the benefit of having it explained to them, in order to clarify this provision so that everybody understood what they could do or not do or were free to do, this notice was written by myself and posted on the bulletin board.

- Q. What is the attachment?
- A. The attachment is a two-part card which an employee could fill out, date and sign their name and clock number and serve one part on the union and the other part on the company, as a notice tendering resignation from the union under the escape clause which was provided in the contract.
- Q. These cards were distributed to the employees?
- A. These cards were not distributed to the employees.
- Q. Tell me what were done with the cards?
- A. This notice "Those wishing to resign during this escape period must notify the union and the company in writing. This may be done by simply completing a notice of resignation card which may be obtained from your foreman or operation manager." A supply of these cards, together with a supply of union membership cards were available in equal stacks side by side on the foreman and operation manager's desk during the escape period.
- Q. When were the cards first made available to the employees?
- [80] A. When were they first made available? I think I would have to say at the time of this notice.

- Q. Was the maintenance of membership clause explained to the employees previously?
- A. It had been explained to those who were in working prior to the end of the strike, when we explained what the changes were being made in the contract.
- Q. When were the cards made available?
- A. To the best of my recollection, not until August 11th.
- Q. General counsel's exhibit number 29. What is it?
- A. This is a list of the employees who have been permanently replaced, as made up from our personnel record cards on June 26th.
- Q. What is general counsel's exhibit number 30?
- A. General counsel's exhibit number 30 is also a list of those permanently replaced, a list which has some revisions in it as a result of our having checked our records against actual replacements.
- Q. What date is it as of?
- A. July 6th.
- Q. How about general counsel's exhibit 31.
- A. Exhibit 31 is a list dated April 18th and—

Mr. Wayman: That's August, I think.

The Witness: I am sorry, August 18th, and as far as I know is the same as the list of July 6th.

- [81] Q. (By Mr. Fleischut) Are there changes between general counsel's exhibit 29, 30 and 31?
- A. I would say there are changes between exhibit 29 and exhibit 30, as I have already explained. The union in our settlement agreement asked about any corrections to the list, if there were people on the list who had been put on there through error in posting, or whether somebody had been left off that

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should have been put on, and any corrections, if the corrections would be made, and we assured them the corrections would be made and I believe the list in exhibit 30 and 31 reflect any revisions or changes as a result of that.

- Q. Was there confusion in the identification of who had been replaced?
- A. I would say with a half a dozen people, yes, but with the majority, no.
- Q. And that was straightened out by general counsel's exhibit number 30, is that correct, and 31?
- A. Yes.
- Q. Was it a difficult thing to compile, this list of replacements, replaced employees?
- A. No, it was not difficult.
- Q. Do you know the approximate number of replaced employees that appear on the list of the 26th?

Mr. Wayman: I suppose we could all count them, probably, if it is information you are seeking.

[82] *Mr. Fleischut:* If you know.

The Witness: I don't know.

Mr. Wayman: If he is trying to impeach his own witness, I don't think he should.

- Q. (*By Mr. Fleischut*) When was that list that is general counsel's exhibit 29 presented to you?
- A. On the 26th.
- Q. Do you remember if that was in the afternoon or the morning?
- A. I don't remember whether it was afternoon or morning. It was the 26th.

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Q. Do you recall the number of replacements, other than the number that appears on that list, being given to the union on that day?

A. On that day?

Q. Yes.

A. No.

Q. General counsel's exhibit number 32. This is a long column affair. Will you explain it, identifying it column by column?

A. This is a list of the replacements in alphabetical order.

Q. Is that column one?

A. Column one.

Q. All right, and what is column two. Explain each of these columns on there.

[83] A. The column headed job number is the job number the employee held as of March 31, 1959, and the department number is the number in which he worked, the placement; it gives the name of the employee, of the replacement who replaced the employee and column one and the job number on which replacement replaced employee, and column one, that is. The last, the right hand column is the date of the replacement, the date on which the replacement occurred.

Q. The paper titled, the last column, date of placement, is that incorrect? Shouldn't there be an r-e in front of placement?

A. Just semantics.

Q. Is there another column on that page? I direct your attention to the area between the first column of the employees name and the job number.

A. There is another column but it is difficult to read. The column between the replaced employee in col-

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umn one and the job number column on which I noted the date the employee applied for reinstatement.

Q. Explain the symbols that appear in that column opposite each name. Where there are numbers, what does that represent?

A. The numbers represent the date they applied for reinstatement.

Q. What does the indication NT mean?

A. "N" means they did not reapply, in the first case here, [84] and the "T" indicates the employee was terminated on August 20th.

Q. Some of the other columns, I note there is an "N".

A. That means they did not apply.

Q. I also note the column to the right of the one listing the name of the replacement, and some symbols, "Y", "NH", "LO", "Y", and so forth. What do they mean?

A. "NH" means this replacement was a hire hire, "LO" means this was a replacement by a former employee who had been on layoff, and "Y" simply means were they still working as of the time this list was made up. "Y" meant yes.

Q. I see a number opposite a name there. What does that mean?

Mr. Wayman: I can't hear that at all.

Q. (By Mr. Fleischut) On Page two there is a number opposite Mr. Burkhardt's name, about half way down the page, 188. What does that number indicate?

A. It would indicate at the time we checked this—when we rechecked this, Mr. Burkhardt was no longer on job 589 but was on job 188.

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- Q. So the numbers next to the replacement name indicate a new job number, is that correct?
- A. Yes.
- Q. Before the name of the replacement I notice "X" and "O". What do they mean?
- [85] A. I honestly don't know. Those are somebody else's hieroglyphics. I don't know.
- Q. Do you have anything with you which would give you an opportunity to refresh your recollection on that matter? You can't interpret that?

Mr. Fleischut: May I solicit a stipulation as to what they mean?

Mr. Wayman: Since I don't know either it would be very dangerous for me to stipulate. Let me inquire.

Trial Examiner: All right, go ahead.

Mr. Murphy: We will offer to stipulate. Mr. Trial Examiner, the "X" and "O" deal with where the personnel files for these people were as of Thursday of last week. Since, long since the strike, there has been a decentralized personnel program. Some files are now in the main personnel office and some files are in the south plant, and I asked that all of these files be collected together, and that is what "X" and "O" meant, where they were.

Mr. Fleischut: Thank you.

- Q. (*By Mr. Fleischut*) Referring to this same general counsel's exhibit, what is the date of the compilation of that list?
- A. How is that?

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Q. What is the date of the compilation of this list?

Mr. Wayman: Do you have the exhibit it refers to?

[86] *The Witness:* That is exhibit 32—

Mr. Wayman: It appears to me you don't have the exhibit, Mr. Ferrell, or do you?

The Witness: We do.

Mr. Wayman: I thought perhaps we took it away when we were explaining the "X's" and "O's".

The Witness: The date is on the subpoena, item 32:

Mr. Wayman: There is no date on the subpoena, Mr. Ferrell.

The Witness: There is no date indicated on the list?

Mr. Wayman: Since we are being rather informal, will you tell us as nearly as you can, when it was prepared?

Mr. Fleischut: I may have an original copy of that with me.

Mr. Wayman: I think it would perhaps clarify the record a little bit; if I understand this correctly, Mr. Fleischut, this was a list prepared at the request of the Board in process of the investigation, is that true?

Mr. Fleischut: Mr. Ferrell would know better than I.

Mr. Wayman: Is that true?

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The Witness: That's right, and why there is no one date on that, this thing grew and grew as the Board required more information and columns were added.

Mr. Fleischut: I have a copy indicating August 18th. Could that be the right date, to you?

[87] *The Witness:* Something like that.

Mr. Wayman: May I inquire as to whether the witness answered the last question?

Trial Examiner: You mean about the date?

Mr. Wayman: Yes. Was August 18th about the correct date?

The Witness: I would say this was approximately the date the list was in existence, yes. That's all I could say.

- Q. (By Mr. Fleischut) Have there been changes since that time?
- A. Not—
- Q. Let me rephrase the question. Have other employees asked for reinstatement since that time?
- A. They may have. I can't say positively yes or no.
- Q. With reference to general counsel's exhibit 33. What is it?
- A. It is a list of the temporary employees that were hired during the strike.
- Q. What was the disposition of these employees at the end of the strike?
- A. These employees were all laid off at the end of the strike.
- Q. I see several columns on the list. The first column on the left is the name, is that correct?
- A. Correct.

[88] Q. And what do the other markings indicate?

A. Date they started to work and date they were terminated.

Q. The request for reinstatement, general counsel's exhibit number 32, those were individual requests were they, I mean the individual employee actually came to the employment office and asked for his job?

A. Yes.

Q. I show you a document marked general counsel's exhibit number 35 for identification, and ask you if you can identify it.

(Thereupon, a document was marked general counsel's exhibit 35, for identification.)

Mr. Wayman: Did you answer the question, Mr. Ferrell?

The Witness: No, I didn't.

Mr. Wayman: I think the record should show I am now examining the document. This evidently was prepared in response to the union's request of just exactly how people would be recalled to work following the settlement of the strike, and how they would fit in with the people who were working and had superseniority.

Mr. Fleischut: Yes.

Q. (By *Mr. Fleischut*) It was prepared by who?

A. To the best of my recollection, it was prepared by the company.

Q. And what date was it presented to the union?

[89] A. This I do not know.

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- Q. Does the date of May 28th appear to be correct?
- A. It could have been because on that date we discussed this twenty year superseniority, and they asked this question and we made this response.
- Q. It was prepared by the company and given to the union in the course of negotiations?
- A. Yes.

Mr. Fleischut: I offer into evidence General Counsel's Exhibit 35.

Trial Examiner: Any objection?

Mr. Wayman: No objection.

Trial Examiner: All right, the document may be received in evidence, and marked general counsel exhibit 35.

(The document heretofore marked general counsel's exhibit 35, for identification, was received in evidence.)

Mr. Wayman: May I request an opportunity to make a copy of the exhibit, because this is evidently the paper we weren't able to find.

Trial Examiner: All right, you are authorized to take the exhibit for the purpose of having copies made of it.

Mr. Fleischut: Exhibit 35.

- Q. (By Mr. Fleischut) I show you a document marked general counsel's exhibit number 36 for identification, and ask if you can identify this.

[90] (Thereupon, a document was marked general counsel's exhibit 36, for identification.)

Q. (*By Mr. Fleischut*) Can you identify it?

A. Yes, this was a letter addressed to me by Mr. Borodano of local 613, dated December 30th, which I received.

Mr. Fleischut: I offer it into evidence.

Mr. Wayman: This is objected to, if the Trial Examiner please. I have seen this paper before and I can't imagine what the possible relevancy is that it could have.

Trial Examiner: What is the date of the letter?

Mr. Wayman: December 30, 1959.

Trial Examiner: Is this part of the chronology of the case?

Mr. Fleischut: Part of the unconditional request for reinstatement.

Trial Examiner: I will over rule your objection, and receive the letter in evidence.

(The document heretofore marked general counsel's exhibit 36, for identification, was received in evidence.)

Q. (*By Mr. Fleischut*) General counsel's exhibit 36, makes reference to a telephone conversation. Do you recall such a conversation? Excuse me. A conversation.

A. I don't recall such a conversation.

Q. You don't recall the conversation?

A. No, sir.

[91] Q. Was the company's policy announced — strike that. Was it the company's announced policy at the

conclusion of the strike that the strikers would be recalled as they were needed?

A. As they were needed, when the production line started back up in full production, and as much as possible in accordance with seniority.

Q. And was it announced that the strikers were not to report to the jobs until they were called back?

A. Yes.

Q. It was a don't-call-us we-will-call-you type of thing, is that correct?

A. That's right.

Q. Now when did your 1959 contract with the union expire?

A. March 31, 1960.

Q. I was referring to the spring of '59.

A. March 31, 1959.

Q. And did a strike occur at that time?

A. Yes, it did.

Q. And have there been negotiations previous to the commencement of that strike?

A. Yes, there had.

Q. When did the negotiations start? Can you refer to general counsel's exhibit number 2? You may, if you like.

A. January 10—no, wait a minute. February 10, 1959.

[92] Q. And when, during the course of the strike, was the question of superseniority injected into the discussions?

A. When during the course of the strike?

Q. Yes. During the negotiations.

A. Prior to the strike?

- Q. No, sir, after the strike began.
- A. Yes, sir, we discussed superseniority, as I previously stated. We said, first of all, on May 11th there would have to be some kind of a right, a way, to implement our promise to these people, that they would have employment security to the extent they would not be laid off as a result of the settlement of the strike. We did not talk about superseniority, as^o the twenty years superseniority, until May 28th.
- Q. I see in answer to my question you are making reference to what appears to be a chart. May I examine it?
- A. Yes.
- Q. Is this chart something you have drawn up yourself?
- A. Yes.
- Q. Where is the information gathered from, from which you made that chart?
- A. My negotiation notes.
- Q. These were your own personal notes?
- A. Yes.
- Q. What do you recall saying as of the 11th of March -- strike [93] that. The 11th of May, 1959, regarding the superseniority.
- A. Simply that the company had given assurance to these people who came to work, anyone who came to work during the strike, under strike conditions, that they would not be laid off, fired, lose their job because of the settlement of the strike. We knew because of the number of people on ~~lay~~ off and in light of the business which we had estimated, projected, that this was going to require some sort of seniority, additional seniority, which would give these people the job assurance which we felt we had

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the right to offer them, as permanent replacements. Otherwise, they wouldn't be permanent.

Q. Exactly what was it that you told these employees, that is these replacement employees?

A. What did we tell them?

Q. Yes.

A. We told them only that they would not lose their jobs as a result of the settlement of the strike.

Q. Did you not elaborate upon that?

A. We did not say "You will have an additional twenty years," no.

Q. Or any other form of accelerated or superseniority?

A. No, because we didn't know in the beginning how we were going to resolve this problem.

Q. It is correct you did not make statements concerning accelerated or superseniority to the employees, is that correct?

[94] A. I would say that is correct.

Q. Now I ask you what you said to the union in negotiations on the 11th?

Trail Examiner: Haven't you been over this about four or five times?

Mr. Fleischut: I want you to address yourself to what you recall you said. If you gave any reason, that's all right with me, but state exactly what you recall saying to them. If you have notes I don't mind if you look at them.

The Witness: We told the union we would have to arrive at some kind of a seniority agreement, granting superseniority rights to all strikers who had returned to work prior to the end of the strike.

- Q. (*By Mr. Fleischut*) This is a typewritten sheet?
- A. I have the handwritten notes, if you want them.
- Q. I would like to—where does the date appear on this sheet?
- A. Right there.

Mr. Wayman: I am sure that's a very pleasant conversation but I can't hear it.

Mr. Fleischut: Let the record indicate I am examining Mr. Ferrell's notes of May 11th.

Mr. Wayman: He appears to be pointing at something and I am sure you are saying something, but I just can't hear it.

- Q. (*By Mr. Fleischut*) I would like to offer into evidence [95] your handwritten notes of that date, what you have identified, Mr. Ferrell.

Mr. Wayman: Now, I am going to object to that. In the first place, I don't think it is proper to offer handwritten notes in evidence whenever the witness is here to testify. He has been permitted by his own counsel, which was generous, to refer to his notes with which to refresh his recollection, which is all right, but I think he ought to testify rather than offer his notes.

Trial Examiner: Actually, I don't know if the record shows the result of the examination of the longhand notes any how. The question arose whether or not the witness made longhand notes about informing the union negotiation committee about superseniority for returning strikers, and the witness then obtained his original notes, and I assume the original notes back up his statement.

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Mr. Fleischut: They so would if put into evidence. Perhaps counsel would rather let him read that portion into the record and we may stipulate that is what his notes say.

Mr. Wayman: The witness testified—

Trial Examiner: I don't know. You pull this out and roll it around and wrap it up in so many different ways.

Mr. Wayman: I think it is in there about four times.

Trial Examiner: At least four times. You roll it and scrape it and stretch it out and turn it over but it all [96] comes out the same.

- Q. (By Mr. Fleischut) Let me ask the witness to read into the record his notes regarding superseniority on that date.
- A. My note on May 11th negotiation session with the union says "seniority agreement granting superseniority rights to all strikers who returned to work prior to the end of the strike."
- Q. Did you indicate on that date adamancy or lack of adamancy in making this proposal?

Mr. Wayman: Do you understand that question?

The Witness: Yes, I understand it. We said there had to be some way to take care of this problem. I don't think there was any question about us being positive in our statement. To say we were adamant, no.

- Q. (*By Mr. Fleischut*) Were you willing to bargain this away, superseniority for strikers?

Mr. Wayman: This is the difficulty in not objecting to some of the previous questions.

Trial Examiner: This is a very peculiar way of testing good faith in bargaining. I don't think it is a fair question.

- Q. (*By Mr. Fleischut*) Did you state whether or not you were willing to bargain away this point?

Trial Examiner: I don't think you have changed the substance of it at all. Did you tell them you were willing [97] to bargain on it?

The Witness: We were perfectly willing to explore any possible way of implementing this and that we were not insisting on superseniority per se. We would be glad to talk about any other method of accomplishing the same end.

Trial Examiner: I suppose the best way to get around it was when you made that statement to the union negotiating committee, what did they say?

The Witness: Excuse me.

Mr. Fleischut: Let the record indicate the witness is referring to his notes, his handwritten notes —his typewritten notes of May 11, 1959.

The Witness: It is easier to find. I have no note of any response by the union at that time.

- Q. (*By Mr. Fleischut*) Mr. Ferrell, have you on previous occasions, under oath, made statements concerning the subject of this case?

A. Yes.

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- Q. Specifically you have given affidavits, is that correct?
- A. That is correct.
- Q. To whom were the affidavits given?
- A. To Elmer Hope, field examiner, for the National Labor Relations Board.
- Q. Do you recall how many affidavits you give Mr. Hope?
- A. Three, I think.
- [98] Q. Would four refresh your recollection?
- A. I only recall three.
- Q. Would you describe for me the circumstances under which the affidavits were given? Where were you, where was Mr. Hope, who was present and who wrote what down, and so forth, in a narrative form?
- A. Yes, these were written down, narrated, in Mr. Murphy's office.
- Q. Who is Mr. Murphy?
- A. Mr. Murphy is general counsel for the company.
- Q. All right, and who was present?
- A. Mr. Murphy and Mr. Hope and myself.
- Q. Stenographer?
- A. Stenographer.
- Q. Who dictated the affidavit?
- A. Mr. Murphy.
- Q. And where did Mr. Murphy get the information that he dictated?
- A. From me and from the record.
- Q. In other words, you said—you gave the information, and Mr. Murphy phrased it, is that correct?
- A. That's correct.
- Q. The stenographer then typed the information up?
- A. Yes, she did.

Q. In affidavit form?

[99] A. Yes.

Q. Do you know if Mr. Murphy reviewed the affidavits before you signed them?

A. We both did.

Q. Both of you, is that correct?

A. Yes, sir.

O. And you read them before you signed them?

A. More than once.

Q. Then you swore to them before Mr. Hope, is that correct?

A. That is correct.

Q. Was it the same day that you gave the affidavit that you swore to it and gave it to Mr. Hope?

A. No, I believe he came back, at least in one case, the following day—over a week end—he came back and got it.

Q. And the information you gave in these affidavits, was it true? Was all of the information contained in the affidavits truthful?

A. Certainly.

Q. And it is still truthful today?

A. Yes.

Q. Now if you will bear with me for one moment, I want to show the affidavits to the witness.

[103] Q. (*By Mr. Fleischut*) Mr. Ferrell, on the 11th what type of accelerated seniority was advocated by the company, May 11th? What form was it to take?

Mr. Wayman: Accelerated, did you say?

The Witness: We said it had to be some kind of superseniority. We didn't know what form it was going to take.

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- Q. (*By Mr. Fleischut*) When was the next negotiation session?
- A. Following the 11th?
- Q. That's correct.
- A. May 13th.
- Q. What did you say on that occasion about superseniority?

Mr. Wayman: If I were to ask that question, I am pretty sure there would be an objection. I don't know if he said anything about seniority.

- Q. (*By Mr. Fleischut*) What, if anything, did you say? Mr. Ferrell, I don't object to your using your affidavit. I assume you have copies of it.

Mr. Wayman: We have a c and I will make it available to Mr. Ferrell, if it is all right. I am not exactly sure what procedure I am following, but whatever it is, I just handed him his affidavit.

- Q. (*By Mr. Fleischut*) I am referring to the last paragraph on page 9 of your first affidavit. What, if anything, was [104] said at the negotiation session on May 13th regarding superseniority?
- A. This was seniority based on being equal to the senior employee in the department where the replacement found himself.
- Q. That was a company proposal?
- A. A departmental type of superseniority.
- Q. That was a company proposal? Was that a company proposal?
- A. Yes.
- Q. When did the next negotiating session take place?
- A. April 14th—I am sorry.

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Q. Was that a full committee meeting?

A. I am sorry. Wait a minute. Let's start over again.

Q. I mean May.

A. Talking about the 11th and 13th and the next was on the 14th?

Q. What type of a meeting was held on the 14th?

A. Well, there were two meetings on the 14th.

Q. What type of meetings were they?

A. One meeting in the morning with the regular committees, and a side-bar session in the afternoon.

Q. Was the problem of superseniority discussed at either of these? I am still at the bottom of page nine of your first affidavit, Mr. Ferrell.

A. We were talking about the superseniority.

[105] Q. What is a side-bar conference?

A. Side-bar conference was a session between members of the company negotiating team and the union negotiating team without the full committees. It was an abbreviated committee session.

Q. Were there any special rules and regulations which were applied to the special side-bar meetings?

A. No, except they were, for the most part, informal discussions, exploratory type of discussions to see where we could go from there, where we might proceed to try and reach agreement.

Q. Now with reference to the 14th at which meetings were superseniority discussed at?

A. Pardon?

Q. Which meeting on the 14th, the full committee meeting, or the side-bar conference, or neither, on the 14th?

A. You say was this discussed at these meetings?

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- Q. Yes.
- A. Yes, I would say it was.
- Q. When was the next negotiating session after the 14th?
- A. The next one was on the 18th.
- Q. Did you have a side-bar conference on the 15th?
- A. Yes, we did but I made no record of that meeting.
- Q. Do you have any independent recollection of what was discussed at that meeting?
- A. No, it was just merged in with the rest of it now.
- Q. On the 18th was the matter of superseniority discussed?
- [106] A. On the 18th, you ask?
- Q. Yes, that's correct.
- A. I do not have any recorded notes of the meeting of the 18th.
- Q. When was the next meeting held?
- A. The 22nd.
- Q. Was superseniority discussed at that meeting?
- A. We were still talking about equal seniority in the department.
- Q. That would be a form of superseniority?
- A. Yes.
- Q. When was the next negotiating session held?
- A. On the 23rd.
- Q. Was the subject of superseniority discussed at that time? I am still on your affidavit on page nine, the last paragraph, sir, if that is any help to you.
- A. We did on the 23rd, except on the 23rd the discussion was more around who had been replaced, and what was going to happen to these people who had been replaced. So there was this discussion.

Q. On the 23rd did you make any statements concerning the bargain ability of this issue? Bottom of page nine again.

A. Yes, the same thing as I said before, we took a positive position we were going to have to have some sort of protection for these people in the way of giving them a job assurance, and that we told them they would have.

[107] Q. Did you make any statement about making concessions?

A. Yes, we said we would be willing to bargain on what form this job assurance would take—we were all the way through.

Q. Did you indicate whether or not you would bargain it away entirely?

A. Not the job assurance.

Q. I don't think that's—

A. We said we didn't care what form it took. We were willing to bargain on the method to be used to implement it.

Q. Is it correct on that date you said you would have to have some form of superseniority?

A. Yes, some way to take care of this problem.

Q. On the 23rd were any requests made of you for information? Top of page ten.

A. Yes.

Mr. Wayman: This is objected to because of the technical word information.

Trial Examiner: May be that is preliminary. Go ahead.

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Q. (*By Mr. Fleischut*) On the 23rd of May did the union request the names of all employees who had been replaced?

A. Yes, they asked us who had been permanently replaced.

Q. Did you provide them with that information?

A. No, we did not.

Q. When did you refuse to provide them with that information?

Mr. Wamyan: This is objected to again, as to form. I think if he would ask the witness what did he say about [108] it perhaps that would take care of it.

Q. (*By Mr. Fleischut*) What did you say concerning the request for this information?

A. On the 23rd?

Q. On the 23rd.

A. On the 23rd we gave the union the number of employees but we did not give them names. We told them we would give them a further answer at the next session.

Q. When was the next negotiating session held?

A. That was on the 28th.

Q. What did you do regarding this superseniority policy between the 23rd and 28th, if anything?

A. I think the record will show that we reduced it to writing.

Q. An exhibit which is already in the record, is that correct?

A. Right.

Q. On the 28th is when you announced that procedure, is that correct?

A. We did not announce it on the 28th, no, sir.

Q. What did you do on the 28th with regard to general counsel's exhibit number 12, that is the replacement policy and procedure dated 5/27..

A. What did we do with it?

Q. Yes.

A. This was given to our operation managers, our general managers—

[109] Q. No, what did you do with it at the bargaining session on the 28th?

A. The bargaining session on the 28th. Oh. The union first asked us if we had the list of replacements.

Q. Please respond to my question and I will get to that. You previously offered this testimony about what you did with this policy dated the 27th on the 28th.

Mr. Wayman: I think he has too.

Trial Examiner: He has already stated it three times. Once when the exhibit was identified, and twice when you went over all of the exhibits the second time. I thought you had something you wanted to point out to the witness in connection with his affidavits.

Q. (*By Mr. Fleischut*) On May 28th did anything occur with regard to the request for the names of the employees who had been replaced?

A. Yes, the company took the position they were under no obligation to give this information to the union.

Q. Did you give it to the union at that time?

A. No, we did not.

Q. When did the next negotiating session take place?

A. May 29th.

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- Q. Was there any discussion of superseniority at that time?
- A. Yes, there was a discussion of it.
- Q. That will be sufficient. When was the next negotiating [110] session?
- A. On June 2nd.
- Q. Was superseniority discussed at that time? Page eleven of your affidavit, the first full paragraph.
- A. Yes.
- Q. What was the company's position at that time?
- A. I would like to turn to the affidavit here.
- Q. Please.
- A. We stated the company was not adamant as far as the twenty year plan was concerned. We pointed out we had presented two separate seniority proposals; the twenty year plan and the seniority equal to the most senior one in the department, as I have already mentioned, and as was mentioned, at earlier meetings. Neither of these were acceptable to the union.
- Q. When was the next negotiating meeting?
- A. Wait just a minute.
- Q. Pardon me.

Mr. Wayman: He hadn't quite finished his answer.

The Witness: There was a third thing which we mentioned at this meeting on the 28th, and this was the—I am sorry. After while I will get the date straight. Excuse me. We are talking about June 11th, is that right?

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- Q. (*By Mr. Fleischut*) The last full paragraph on page eleven of your affidavit you say you discussed this problem.
- A. I am sorry. I want to be sure which meeting we are [111] talking about.
- Q. June 11th.
- A. Thank you. We suggested a further plan then on June the 11th.
- Q. What was this further plan?
- A. That the replacements enjoy the same seniority consideration as the union officers.
- Q. What consideration was that?
- A. This is that they have superseniority and the last to be laid off in their department from the plant.
- Q. When was the next negotiating session?
- A. June 11th? June 12.
- Q. Was superseniority discussed at that session?
- A. Yes.
- Q. What was said concerning it?
- A. At that time we said we would like to formulate the—an offer for the union's consideration, job assurance on the same basis as the union officers.
- Q. I refer you now to page twelve of this affidavit. You state therein throughout the entire period, since May 7th, the company first sought permanent replacements, the company's only objective has been to find sufficient workers to produce its products and to assure the continued operation of its plants. Did you so state that?
- A. This is true, yes.
- [112] Q. We were discussing June 12th, I believe the last date, in issue. How many remaining issues were there to be decided in the contract negotiations?
- A. On June 12th?

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- Q. Yes.
- A. There were three.
- Q. What were they?
- A. They were discharges of five employees, the company's replacement program.
- Q. By that you mean superseniority?
- A. I mean some job assurance for the replacements that have been hired during the strike, be it superseniority or what it be.
- Q. And that incorporated the problem of superseniority?
- A. It was the problem of what to do about these replacements.
- Q. What was the third issue?
- A. The third issue was union security.
- Q. What do you mean by union security?
- A. This was the section of the contract involving union shop or maintenance of membership.
- Q. Throughout the entire period did you maintain you could not retreat from some form of superseniority?
- A. I object to superseniority per se, because my company said the company consistently evidenced its willingness to negotiate with the union as to the form the job assurance would [113] take. They had to do something about these—
- Q. No, thank you. I can read this.

Trial Examiner: Of course, he wasn't reading it to you. He was reading it for the record.

- Q. (*By Mr. Fleischut*) I direct your attention to June 12th. Did the company make any package proposals on that day?
- A. Yes, we did.

- Q. Do you recall the contents of that package proposal?
- A. Yes.
- Q. What were the contents of the package?
- A. With regard to the discharges, we said the company was willing to give consideration on two of the discharged employees, Karpinski and Skiba. They would be reinstated after a ninety-day disciplinary lay off.
- Q. How long was this offer to remain in effect?
- A. This was—I am sorry. You asked me what the package was and I only told you one item in the package.
- Q. Excuse me. Go on.
- A. The other three discharges, Gilson, Buren and Graffus were to remain discharged. With reference to our replacement policy, we said the company was willing to drop its twenty year seniority plan and offer to give assurance to replacements on the same non-discriminatory basis as has been agreed to for union officers. With regard to union shop the company [114] would accept agreement on maintenance of membership which we had discussed and with respect to the length of contract said this would run from June 15th, 1959 to March 31, 1960. June 15th being the following Monday, and this being Friday on which we made this proposal.
- Q. How long was this offer to remain available for the union to accept?
- A. It was a day offer.
- Q. Did the union request any information on June 12th?
- A. The union again asked who had been replaced and whether there were any officers or stewards.

- Q. Did you reply to that request?
- A. The union did not expect an answer that day. They said they would like an answer after they had a chance to check back at the plant.
- Q. When was the next session held?
- A. June the 13th.
- Q. The 13th?
- A. Yes.
- Q. Did you reply to the request of the 12th on the 13th?
- A. No, sir, we did not.
- Q. You said something concerning it, did you not?
- A. Yes, we did.
- Q. Did you give them the information?
- A. No, we did not. Would you like to know what we did say?
- [115] Q. Not particularly.

Trial Examiner: Well, he may answer it.

The Witness: You asked me.

Trial Examiner: We are not playing musical chairs here, although lots of times I think we are. Go ahead. You may answer.

The Witness: The company will disclose the names of the displaced employees when the individual presents himself for employment, or when the strike is settled, but otherwise we took the position we were not under obligation to give this information.

- Q. (*By Mr. Fleischut*) When was the next negotiating session?
- A. June the 16th.

- Q. Didn't you have a session on the 15th? Page fifteen in your affidavit.
- A. Just a minute. A side-bar conference—
- Q. A side-bar conference that day?
- A. Just a minute. This evidence was a side-bar one because I have no formal notes on it.
- Q. Do you recall what was discussed at that meeting at all?
- A. I can't say that I do, no, sir.
- Q. When was the next session held?
- A. On June 23rd. Wait a minute. I beg your pardon. The 16th.
- [116] Q. Was superseniority discussed at that session?
- A. We discussed the replacements, so whatever discussion in connection with the replacement policy took place in connection with the replacements.
- Q. When was the next negotiating session?
- A. The 23rd of June.
- Q. The 23rd?
- A. The 23rd.
- Q. Was superseniority discussed at that session?
- A. Yes, it was.
- Q. Do you recall what was said?
- A. Yes, we were told by Mr. Coyne that the membership had voted to continue the strike over the twenty year policy. The union also proposed at this meeting, that the NLRB decide the issue on the twenty year policy in an unfair labor practice charge filed by the union against the company.
- Q. Were there any new proposals made on the 23rd concerning the form of superseniority?
- A. Yes, the company suggested that these replacements might be treated much like our out of line job rates,

that they be considered as red circle employees the same as we had red circle job rates which were not in line with our job evaluation system which had been perpetuated when our job evaluation system was installed.

Q. Tell us more about how the red circle plan would work?

[117] **A.** Simply that these people would have preference as far as lay off was concerned, they would not be laid off as long as work was available that they could do.

Q. In other words, the replacements would be exempt from the ordinary seniority system, is that right?

A. That is right. They would not have simply seniority. They simply would be exempted from being laid off under the seniority provision of the contract.

Q. They would be in a separate category by themselves, is that correct?

A. That is what it would have had to be.

Q. This would be a preferred category over the ordinary seniority?

Mr. Wayman: That is objected to. I don't think the witness ought to have to make that conclusion. He has told how the system worked, and the Trial examiner may draw his own conclusions.

Trial Examiner: If you want to explain it further, you may.

The Witness: This was not given any serious consideration by the union and we did not explore it any further. We never got into details as to how it worked.

Q. (*By Mr. Fleischut*) When was the next negotiating session, Mr. Ferrell?

A. June the 24th.

[118] Q. Was superseniority discussed at that meeting?

A. Yes, it was. The company stated we would agree to dispose of the company's replacement job security plans through the channels of the National Labor Relations Board, and the courts without limiting the legal rights of either party to appeal to the ultimate source.

Q. Did anything significant take place on the 24th with regard to the existence of the strike?

A. Mr. Coyne proposed that the union return to work on the basis of some agreement, to abide by the disposition of our replacement policy through the NLRB and the courts.

Q. Let me ask you this question. When did the strike end?

A. The union abandoned the strike — this would be on the 25th of June. We received a telegram to that effect from Mr. Bordonaro to that effect.

Q. That is the telegram that is in evidence, is that correct?

A. Yes.

Q. There was an exchange of telegrams on the 25th, right?

A. Yes.

Q. All of which are in evidence.

A. Yes.

Q. Was there a negotiating session on the 25th?

A. A negotiating session?

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Q. Yes.

A. No, sir.

[119] Q. When was the next meeting?

A. What kind of a meeting?

Q. Negotiating meeting. Were there any other types of meetings?

A. There was a meeting on the 26th at which time Mr. Bordonaro and I believe Mr. Collela sat down with Mr. Bertone and went over the replacement list which we got together at the union's request.

Q. Was there any negotiating at that session?

A. No.

Q. When was the next negotiating session?

A. The next one was on July 7th.

Q. Was superseniority discussed at that meeting?

A. Yes, it was.

Q. It was discussed?

A. It was discussed in the form of discussion about the replacements, not superseniority per se.

Q. On the 7th did you talk about red circle rates, twenty years of seniority equal to the officers and stewards of the union?

A. The 27th?

Q. Yes. A little paragraph on page twenty of your affidavit.

A. I would not say that we discussed twenty year or red circle as a proposal on that date. No.

Q. You didn't discuss the matters on that date?

[120] A. If you are looking at my affidavit it says we had stated grant additional seniority whether it be red circle, twenty years or similar to union officers. Had. Past tense. Not that we did it at this meeting.

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- Q. Did you or did you not discuss it on that date?
- A. We discussed how employees had been replaced. We explained that the least seniority — the least senior person or employee on the job classification needed would be replaced first, and then the union asked the question what happened if an employee had already been replaced and we said they would then fill out a statement of availability and they would then be placed on an opening for which they were qualified.
- Q. Do your notes indicate whether or not you discussed superseniority on that date?
- A. Yes, Mr. Collela asked if we signed a contract on that date and we agree the company discontinue its policy as of April 1, 1960.
- Q. It was discussed?
- A. It was discussed.
- Q. When was the next negotiating session held?
- A. On July 8th.
- Q. Was superseniority discussed at that time?
- A. Yes, it was.
- Q. Did you recall what was said about it?
- A. Yes, Mr. Collela asked what the status of his officers and [121] stewards were as to the superseniority once the contract was signed. We said the superseniority given union officers and stewards applied only to those who were employees of the company. Mr. Collela said he understood once a contract was signed the stewards and officers would all return to their jobs.
- Q. That's not the same type of seniority as the strike replacements, is it?
- A. I beg your pardon?

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- Q. Superseniority for officers and stewards is not covered in the contract?
- A. Yes, it is.
- Q. Sections 18 and 19?
- A. Yes.
- Q. That is a different subject for superseniority, for strike replacements?
- A. No, it is exactly the same subject.
- Q. Did you discuss superseniority for strike replacements on the 8th?
- A. I don't have any specific note that we did. I am sure we talked about it because we were talking about it in connection with replacements, and in connection with officers and stewards.
- Q. Did you make a one-day proposal on the 7th, the day before that?
- A. We made a proposal in connection with the discharges. Our [122] position was this, that even though all four cases had been turned down by the NLRB, we were willing to make one final effort to clear this issue from the table, with no dangling ends or strings attached. We wanted it clearly understood if this offer was not accepted we would withdraw it and maintain a firm position that all five discharges be made permanent.
- Q. How long was the offer to remain open?
- A. This was a one-day offer, which we said for this reason, the union should take time and give serious consideration to the proposal before giving the company's its reply, and in this offer we agreed to reinstate Skiba and Karpinski with a thirty day disciplinary lay off, beginning June 29th but there was

to be no further discussions on the case of Grafius, Buren and Gilson.

Q. What do you mean by a one-day offer? The same day or to be open to the following day?

A. It was good for the duration of this meeting, this day.

Q. But the other one-day offer of the June 12th — how long was that to be available?

A. One day, June 12th.

Q. The same day or until the following day?

A. The same day.

Q. Now we talk about superseniority. Would you explain to us what category of employees were to be granted super- [123] seniority?

Mr. Wayman: I think, if the Trial Examiner please, this is in the record in the form of a document that has been authenticated two or three times, and I don't think there is any argument about it. If it is the general counsel's exhibit 12.

Mr. Fleischut: There are various categories of employees and I think it would be well for him to explain exactly what he means.

Trial Examiner: There is much of this that I don't follow your purpose. It is more of an investigation than a hearing. Can you reframe it? I actually don't follow you on this question. Explain what employees it did apply to?

Q. (By Mr. Fleischut) What category of employees were to be given superseniority?

Trial Examiner: You have been going through all of these documents and talking about super-

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seniority at a dozen meetings, and now you want to know who it applies to? Can you tell us who the employees were that superseniority was to apply to?

The Witness: So that I am accurate, I am just tangled up here. I would like to refer to that policy statement, if I may.

Mr. Wayman: That was exhibit 12, I believe.

The Witness: The twenty year job assurance plan applied [124] to all new hires, to all rehires, and all returned employees.

- Q. (*By Mr. Fleischut*) Did it apply to all of the employees who worked continuously throughout the strike, from beginning to end?
- A. All employees who worked throughout the strike who were bargaining unit employees, or worked on bargaining unit employees' jobs. What I am trying to say is it did not apply to salary or clerical employees who may have worked on production jobs during the strike. I want to make that clear.
- Q. It applied to strikers who abandoned the strike and returned to work, is that correct?
- A. Yes, it did.
- Q. Now with regard to your third affidavit, page two entitled "Second supplemental affidavit", which is the third one.
- A. The third supplemental affidavit?
- Q. Entitled second supplemental affidavit.
- A. All right, I have it.
- Q. On the second page of that affidavit, Mr. Ferrell, I refer you to the eighth line stating "Employees had merely been informed at the time they would be

given sufficient job assurance that their jobs would not be terminated at the end of the strike."

- A. This is so. This is employees who returned to work or went to work during the strike.
- Q. Employees who returned to work or went to work during the [125] strike, is that correct?
- A. Yes, and this is new hires as well.
- Q. Did the company ever make known to the public the superseniority proposal?

Mr. Wayman: I think I should object to that.

Trial Examiner: I will sustain that.

Mr. Wayman: What difference does it make?

Mr. Fleischut: It makes every difference in the world.

Trial Examiner: Don't argue. I have ruled. If you want to put it a different way —

- Q. (*By Mr. Fleischut*) When did the public first know about the superseniority policy?

Trial Examiner: I will sustain my own objection to that.

- Q. (*By Mr. Fleischut*) Was the public ever informed of the superseniority policy?

Trial Examiner: What does the public have to do with this?

Mr. Fleischut: The public has to do with prospective replacements.

Trial Examiner: Now you are getting into another field.

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- Q. (*By Mr. Fleischut*) Were prospective replacements ever informed of the superseniority policy?
- A. The union broadcast our twenty year superseniority policy over the television station.
- Q. When did they do that? When was that?
- A. This was done over the week of May 30th and 31st, when Mr. [126] Coyne appeared on the local television station.
- Q. Mr. who?
- A. Mr. Coyne, Roger Coyne, the international representative of the IUE.
- Q. Up until that time had the company done anything to publicize it to the prospective replacements?
- A. No.
- Q. Now we refer you to paragraph number five at the bottom of page two, the statement, following determination of Erie Resistor to resume production and the hiring of replacements, our personnel office received approximately three hundred applications for employment. Had the company desired to break the strike, it could have replaced all of its striking employees. With approximately ten thousand people unemployed in the Erie labor area, there would have been no difficulty finding sufficient employees. However the company purposely proceeded slowly in its replacement program so as to preserve, if possible, a continuity of employment. Did you make such a statement?
- A. Yes, I did.
- * * * * *
- [127] Q. (*By Mr. Fleischut*) Will you refer to your final affidavit, Mr. Ferrell, the third supplemental affidavit? Do you have that, sir?
- A. Yes, sir.

Q. Page two. Employees who applied for work and were hired as replacements were told if they were hired their job would not end as a result of the termination of the strike. They were not told what type of seniority would be used to assure that continuation of their jobs. According to the records of the company, the first replacements were hired on May 11, 1959, and thereafter—excuse me—therefore replacements hired that day would have been the first to have been notified their jobs would not end—yes, their jobs would not end with the termination of the strike. The first time replacements were notified of the twenty year plan, aside from the letter of June 10th, above, was on June 15, 1959, when the policy dated May 27th was first posted. As set forth in my previous affidavit the draft of May 27th was never distributed except to top management nor posted prior to the 15th of June. When it was posted on June 15th there was also posted a supplement to it which stated the company had offered the union a substitute for the twenty year, the same seniority enjoyed by the officers and stewards and such a substituted plan [128] would be put in effect agreeable to the union and further no substituted plan being negotiated the twenty year plan would continue. Did you make such a statement?

Mr. Wayman: I suppose a lawyer should actually keep quiet when he hears a question like that asked on direct examination. However, I find it difficult to do so. I want the witness to answer the question, if he can. I am not objecting.

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The Witness: The statement is concerning our policy statement, which was made in writing.

- Q. (*By Mr. Fleischut*) Your answer is what?
- A. Yes, it was made in writing in answer to the policy on June 15th. On June 15th the amendment to our policy of May 27th, such a statement was incorporated, yes.
- Q. What I am referring to did you make such a statement in an affidavit?
- A. This affidavit?
- Q. Yes.
- A. Yes, in substance at least.
- Q. Mr. Ferrell, were you able to tell at any given time which employees had been replaced?
- A. Yes, sir, we were—yes, sir, we could.
- Q. Mr. Ferrell, with reference to those employees off-strike that. Did the company refuse to reinstate those strikers who had been replaced?

Mr. Wayman: This is objected to as calling for a [129] conclusion. I think the witness ought not to be called upon to characterize what the company did. Let him tell what happened. He will do it. He has answered all of these questions as directly and factually as he possibly could.

- Q. (*By Mr. Fleischut*) What did the company do with regard to the employees who had been replaced and who applied for reinstatement?
- A. We accepted their application for reinstatement. We did not put them back to work because we considered them as permanently replaced.

- Q. Do you presently have in force a superseniority policy?
- A. Yes, we do.
- Q. Arising out of the strike?
- A. Yes, we do.
- Q. Have you had it at all times since the end of the strike?
- A. Yes, we have.
- Q. Since the conclusion of the strike have employees been laid off who but for the superseniority would not have been laid off?
- A. Yes.
- Q. Since the end of the strike have employees made lesser earnings or been assigned lesser paying jobs as a result of the superseniority policy?
- A. I do not know that.
- Q. Pardon me?
- [130] A. I can't answer that. I don't know.
- Q. Would a search of your personnel records give you such an answer?
- A. With a lot of assumptions, it would, yes, but you would have to make a lot of assumptions.
- * * * * *

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[133]

CROSS EXAMINATION

- Q. (*By Mr. Wayman*) Mr. Ferrell, I show you general counsel's exhibit number 35, and ask you whether or not you observe on there a number of pencil notations?
- A. Yes, I do.
- Q. And if I am not mistaken that exhibit proper consists of a hectograph or mimeograph statement, is that correct?
- A. That is correct.
- Q. Will you tell us whether or not the pencil notations were placed there by you or anybody from the company, so far as you know?
- A. They were not so far as I know, and I think Mr. Fleischut will agree they have nothing to do with this proceeding.

Mr. Fleischut) No, only the hectograph material.

- Q. (*By Mr. Wayman*) Referring now to general counsel's exhibit 36, what appears to be a letter from Mr. Bordonaro dated December 30, 1959, addressed to you. If my memory serves me correctly you were asked whether or not there was a telephone conversation concerning that letter?
- A. Yes.
- Q. You remember that?
- A. Yes.
- Q. Is there anything in that letter about any telephone conversation?
- A. No, there is not.

[134] *Mr. Fleischut*: So as not to be misleading, Mr. Wayman, I corrected the telephone conversation, to

say conversation. Maybe you want to ask him if there was any conversation.

Mr. Wayman: I think the letter will speak for itself.

- Q. (*By Mr. Wayman*) Looking now at general counsel's exhibit 28—I think you have most of them up there—this exhibit has attached to it a card which appears to be in two parts, is that right?
- A. That's right.
- Q. In your direct examination I believe you either told us or began to tell us how these cards were used. Will you tell me what you said how these cards were distributed to employees, if they were?
- A. The cards were made available on the foreman's desks along with application for membership in the union, so that both were available whether an employee wanted to join, or whether an employee wanted to resign.
- Q. Was the foreman given any instructions regarding the distribution of these cards?
- A. Only that he was to give the employee a card if they asked for it, plus the notice he got from reading this on the bulletin board.
- Q. Was he instructed to tell them which one to take?
- A. No, sir.
- Q. Was he instructed not to tell them which one to take?
- [135] A. Yes, sir.
- Q. Referring to general counsel's exhibit number 21 which is a list or compilation of telephone messages produced in answer to the subpoena, will you tell

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us whether or not you received a substantial number of calls to this number 6-6221?

- A. Yes, we did. We ran some checks on that, some counts, and we had calls running as high as a hundred and fifty calls an hour.
- Q. Referring now to the several meetings in which the union asked you to give the names of the persons who had been replaced—I am sure you recall the questions regarding those meetings?
- A. Yes.
- Q. Did you tell the union why you felt you were under no obligation to supply these names?
- A. Yes.
- Q. What did you tell them?
- A. We told them that on the basis of their position that all of these employees being reinstated, called back to work, on the basis of their regular seniority, that we on advice of counsel refused to give them the information.
- Q. Did the union take a position throughout that all employees had to be reinstated?
- A. Yes, they did.
- Q. Including those who had been discharged?
- A. Up until the final agreement, yes.
- Q. Now you spoke of five employees who had been discharged. [136] What was the reason for their discharge?
- A. One employee was discharged for spitting on an employee, a working employee. Another was discharged for chasing an employee down the street and pounding him on the back. Another one was discharged for—two more were discharged for direct assault, by striking employees and knocking

them down. One more was discharged for reaching into an automobile of an employee leaving the plant and striking him in the face.

Q. So that the five discharge cases had nothing whatsoever to do with the question of whether or not these employees were reinstated, is that true?

A. That's right. They were discharged, as far as we were concerned.

Q. They were not involved in the question or replacement?

A. That's correct.

* * * * *

Q. (*By Mr. Davidson*) Mr. Ferrell, was there any attempt to hire replacements before May 11th?

A. Before May 11th?

Q. Yes, before May 11th.

A. No, sir.

Q. Can you tell us how much seniority was required at the end of the strike to obtain—to be recalled to employment, to be reinstated?

A. At the end of the strike?

Q. That's right.

A. I believe that was in the record this morning of—

Mr. Wayman: That was at the beginning of the strike?

The Witness: Yes, that was his question.

Mr. Davidson: No, at the end of the strike.

The Witness: I am sorry. At the end of the strike. I would like to give you an accurate answer to your question, [138] Mr. Davidson.

Q. (*By Mr. Davidson*) I would like to have one.

A. I don't have that figure in mind.

- Q. Can you give me within a year?
- A. Well—
- Q. How much seniority is required today?
- A. This is a question of fact and not of opinion. I can get you the answer. I don't have it at this time.
- Q. How much seniority is required today to retain employment in the plant?
- A. I can give you that also but I don't have it right at this minute.
- Q. You don't have either answer?
- A. That's right.
- Q. I would like the answer to both questions.
- A. These are all a matter of fact again and I will be glad to get them for you.
- Q. Yes. Now, one thing I wanted to clear up, if I may. On your direct examination you stated on June 15th the May 27th policy statement was posted together with the June 15th attachment. Was this the first time that the May 27th policy statement had been posted in the plant?
- A. Yes, sir.
- Q. I would like to call your attention to the negotiating meeting on May 23rd, May 23, 1959, which was a Saturday. I [139] would like to ask you if you recall that on that day you presented the union with specific information with respect to the composition of the work force then in the plant. Do you recall that?
- A. This is on the 23rd, you say?
- Q. On the 23rd of May, and I will for your assistance state what I mean by specific information, that is information as to numbers of people falling within certain seniority classifications and other numerical information pertaining to those replacement people.

- A. I have no such information on May 23rd. I do find such information was given on May 28th, if you want to double check that.
- Q. On that date do you recall giving numbers of people and amounts of seniority?
- A. Yes.
- Q. Do you recall a discussion of a group of thirty-five people without former bargaining unit seniority?
- A. I would like to say the question was asked of the company on the 23rd about the composition of the seniority and the bargaining unit. This question was asked. We didn't have the information to give on the 23rd and we gave it on the 28th.
- Q. I am not particularly interested in the date but do you remember at one point you told the union there were thirty — pardon me — there were forty-eight people working who had former [140] bargaining unit service, and thirty-five would not? Does that strike a bell?
- A. I have a note here on the forty-eight and a break down on them but I don't have a note on the thirty-five.
- Q. Do you remember discussing thirty-five in addition to the forty-eight?
- A. I don't remember the thirty-five. no.
- Q. What date do you have indicating the discussion of the forty-eight?
- A. In the afternoon of May 28th.
- Q. Can you recall there were in fact people working on May 28th who had no former bargaining unit seniority?
- A. Yes, I am sure there were.

- Q. And can you recall that your discussion encompassed all people working on that date, whether or not they had former bargaining unit seniority?
- A. Yes, we did discuss that.
- Q. Can you recall the discussion of those without former bargaining unit seniority that the discussion would have to be in generalities because you were in such a mess you didn't know where the hell you were at?

Mr. Wayman: I hope that purports to be a quote.

The Witness: Yes, it does.

Mr. Davidson: We do use language occasionally such as that but not in a question, unless it is a quote.

- [141] *The Witness:* You are asking for a specific list? A specific list at a specific time, I probably said that.

- Q. (*By Mr. Davidson*) In the discussion of the thirty-five or of the people with non-bargaining unit seniority, since this is all you can recall, I am asking you if you said that these people were involved in some way or another for consideration but actually 'you were in such a mess you didn't know where the hell you were at? Does that strike a bell?

- A. I knew where I was. I don't get your inference.
- Q. Pardon me.
- A. What is that referring to? I know where I was. I was on the tenth floor of the Commerce Building in the Federal Mediation Office. Certainly you don't mean that. What are you referring to?
- Q. Did you know where you were with respect to this identity of this mass of replacements without former bargaining unit seniority, and with respect to the

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identity of the jobs which they held at the time, and with respect to the identity of the people they replaced?

A. Did we know?

O. Yes.

A. Yes, we knew.

Q. And your answer did not pertain to this aspect of knowing where you were at?

A. I would say no. I want to say in respect to this thirty-[142]five that you keep mentioning —

Q. I will try to stop mentioning that.

A. I have no such figure. I simply have the algebraic figure of "X" here to represent the number of permanent replacements that have been hired at that time. We discussed with the union of the number of returning strikers and the number returning from lay-off. This is where the forty-eight came from. We told them in what seniority groupings they were and how many in each seniority grouping but we said as to the number this was—as to the number of current replacements, this was a quantity "X" and as far as I know we refused to tell them how many there were. I don't know where the thirty-five came from.

Q. Did you know what "X" equaled at that time?

A. Did I know?

Q. Yes.

A. It was on our records.

Q. Were those records readily available to you at that time?

A. Yes, sir.

Q. You recall saying at that time "We have people all over the place; we have got our paper work not up

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to date, accounting department, sales, all of it so screwed up that we don't know where we are?" Do you recall saying that?

A. I probably did.

Q. You recall saying what this is going to mean in the [143] final composition of the organization in Erie before we get through and what we are going to do that people gets involved and see how many and who are the replacements, we don't even know ourselves?

Mr. Wayman: This is objected to because it is not relevant material. The witness could have said that and it would have no effect whatsoever on the outcome of this case.

Trial Examiner: That's true. Over a series of fifty meetings, I suppose a man would say most anything, either in or out of context in the course of that time. It is sort of a negative type of testimony, at best.

Mr. Davidson: I think the relevancy is—

Trial Examiner: You may answer.

The Witness: Your inference is I am sure we did not know who was replaced, and this is not so. All I was saying we did not have our records up to date, as of a given hour because it had to be done on a delayed basis because we didn't have the clerical help available. That's all that we knew. We could find.

Q. (*By Mr. Davidson*) Now will you ask the question I asked initially and that is do you recall making the statement as I read it?

A. Yes.

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Q. Now can you tell me when Erie Resistor determined to resume full production by hiring replacements?

[144] A. Yes, sir, this was on May 2nd, just prior to the issuance of our letter of May 3rd.

Q. Did you start soliciting replacements at that time?

A. No, sir.

Q. At what time did you start?

A. The following week.

Q. Do you recall the date?

A. I would say we began accepting people following May the 11th, from May 11th on.

Q. When did you start receiving applications?

A. I assume again this is a matter of fact that can be established. I presently don't know.

Q. Had you received applications prior to May 2nd when you determined to resume full production?

A. No, sir.

Q. I take it you had received some prior to May 11th when you hired people?

A. This I do not know.

Q. Do you recall by what date the three hundred applications were received to which you referred earlier in your testimony?

A. No, but this again is a matter of record, and fact that could be substantiated.

Q. In your recollection of having made that statement, were they received fairly shortly after the determination to resume production?

[145] *Mr. Wayman:* I suggest the witness said he doesn't know but he can find out.

Mr. Davidson: He said he doesn't know the exact date but I think he can give me an estimate.

Gordon D. Ferrell—Cross.

The Witness: I don't. I was negotiating, not hiring people. Somebody else was doing that.

[153] *Mr. Fleischut:* The general counsel will commence the day's hearing by introducing into evidence certain documents indicating the labor market in the Erie area.

I have under subpoena an individual who can identify these but by agreement of the parties they will be submitted in evidence not subject to formal proof.

I would like to identify "area labor market trends" January 1959 as general counsel's exhibit 37. The same document for March of '59 as number 38; May number 39, July, the same document for July 1959 as number 40; a publication of the U.S. Department of Labor entitled chronic labor surplus areas, as 41.

Mr. Wayman: Do you have a copy of this?

Mr. Fleischut: I only have one.

(Thereupon, documents were marked general counsel's exhibits 37 to 41, for identification.)

Mr. Wayman: I would like to have a copy of this exhibit, which appears to be quite a large book.

Mr. Fleischut: So there is nothing misleading here, I would like to indicate now the information I direct your attention to, sir. In general counsel's exhibit number 41—

[154] *Mr. Wayman:* If I may interrupt, Mr. Fleischut. These appear to be official documents of the United States Department of Labor, is that true?

Gordon D. Ferrell—Cross.

Mr. Fleischut: Yes.

Mr. Wayman: Consequently, I am not going to question their authenticity. I assume Mr. Fleischut has obtained official documents of the United States Department of Labor and that these are authentic documents. I do however object to their admission on the ground the information therein contained is irrelevant and immaterial to the issues in this case.

Trial Examiner: All right, go ahead, Mr. Fleischut.

Mr. Fleischut: You want me to answer the objection?

Trial Examiner: What is the purpose of them?

Mr. Fleischut: The purpose of the documents is to point out that the Erie area during all times pertinent to the strike was an extremely chronic labor surplus area, and there was no difficulty in obtaining employees. This is demonstrated in general counsel's exhibit number 41 on pages 79 and 80 where it describes the Erie labor market situation, and in general counsel's exhibits 37 through 40 on the back cover is a chart indicating labor surplus areas which are classified "A" through "F", "F" being the most serious, and I direct the attention of the Examiner to the chart on the back of each of those documents indicating [155] in each of the bi-monthly periods reporting as of July 15th on the monthly report the Erie labor market was in the most chronic category.

Also I particularly direct your attention to a page in each of the exhibits—I am looking at gen-

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eral counsel's exhibit number 40 — where the criteria of labor surplus classification is set forth, and it describes a group "F" which Erie is in each of the months reported, indicating the ratio of unemployment to the total labor force was in excess of twelve percent.

Mr. Wayman: What page is that?

Mr. Fleischut: Page 26 in exhibit 40. Twelve percent or more of the working force, and that the job figures are substantially in excess of the openings and the situation is expected to continue for the next four months. This then interprets the chart on the back and the same figures are presented inside. Now days we like things in picture form and we can see from the chart that Erie is among the few very chronic, most chronic areas in the months concerned.

* * * * *

[156] *Trial Examiner:* Are you now offering these documents in evidence?

Mr. Fleischut: I understand there has been no objection to their admission.

Mr. Wayman: That is not correct.

Trial Examiner: There is an objection to their admission on the ground of materiality.

Mr. Wayman: Not as to authenticity.

Mr. Fleischut: I am offering general counsel's exhibits 37 through 41.

Trial Examiner: I will accept them in evidence. I have grave doubt as to whether they are material

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to the issues [157] here. I will receive them in evidence and they may be marked as general counsel's exhibits 37 through 41, inclusive.

(The documents heretofore marked general counsel's exhibit 37 to 41, for identification, were received in evidence.)

* * * * *

[157] ANGELO COLELLA a witness called by and on behalf of the general counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: Will you state your name for the record?

The Witness: My name is Angelo Colella.

Trial Examiner: Where do you live, Mr. Colella?

The Witness: Saugus, Massachusetts.

DIRECT EXAMINATION

Q. (By Mr. Fleischut) By whom are you employed, Mr. Colella?

A. The IUE-AFL-CIO.

Q. And in what capacity?

A. International representative.

[158] Q. Were you employed in this capacity during the course of the Erie Resistor strike in 1959?

A. Yes, I was.

Q. Did you partake in any way in the negotiations in an effort to settle that strike?

A. Yes, I did.

Q. When did you first appear in the negotiations?

A. My first session was on the 13th.

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- Q. Would you like a copy of general counsel's exhibit number 2, giving the dates of the meetings, while testifying?
- A. Please.
- Q. Did you participate in a negotiating session on May 14th?
- A. There were two on May 14th and I participated in both of them, yes.
- Q. Will you describe what type of meetings they were?
- A. The first one was with the full negotiating team, both the company and the union, and the afternoon sessions were a side-bar conference. This side-bar conference consisted of Mr. Bordonaro and myself for the union, Mr. Ferrell and Mr. Schau from the company, and Michael Prime and Grover Stainbrook from the Mediation service.
- Q. Which meeting was that?
- A. This was the afternoon of May 14th.
- Q. What kind of a meeting did you call it?
- A. Side-bar conference.
- [159] Q. Why was this meeting held?
- A. This meeting was held in an effort to try to get down to some real brass issues on negotiations. I had been here for two days, the 13th and the 14th, and neither side seemed to be making any progress. During the recess I talked with Mr. Stainbrook and asked him—I said "Look, how do you think this is going to end up? You think perhaps if we had a side-bar conference it might help," and Mr. Stainbrook said he would see if he could arrange it, and he came back to me and said "Yes, I will call a recess and we will have a side-bar conference."

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Q. Did the side-bar conferences and this side-bar conference in particular, differ in any respect other than the personnel present from the principal meetings?

A. I beg your pardon.

Q. Were these side-bar conferences any different than the full committee meetings?

A. Yes.

Trial Examiner: How could the witness answer that? He wasn't in on any prior meeting. If you want to limit it to May 13th—

Q. (*By Mr. Fleischut*) On May 13th and the morning of the 14th you met with the full committee?

Trial Examiner: Limit it to starting then.

Q. (*By Mr. Fleischut*) After the 14th did you meet in [160] other full committee meetings?

A. Yes, I did.

Q. How did the side-bar conference differ from the full committee meetings which you attended?

A. It was understood that these side-bar conferences would be held without the taking of minutes, which was so at the full negotiating session, that these would be off the record, and if conclusions were arrived at as a result of these meetings everything would be back to status quo.

Q. If agreements were or were not made?

A. If agreements had been made on some parts but a whole agreement was not reached, everything was taken back off the table and would be back to prior to the side-bar conferences. This is what the company made clear to us, they would be willing to

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meet but in the event we didn't wrap it up entirely, we then would go back to where we left off in the full negotiation sessions. I found that at these side-bar conferences both the company and the union actually had a great deal more freedom. We weren't on the record. There wasn't anyone there taking minutes, as such. We could discuss many things which bothered the company or bothered the union and we didn't have to worry about "Well, this is in the minutes and this is what you said, or this is not what you said."

Q. What occurred on the 14th at the side-bar meeting?

[161] *Mr. Wayman:* I suppose I should object to that, if the understanding was it was off the record. It does seem a little odd to put in an off the record conversation.

Trial Examiner: Well, I think the witness can describe what happened at the side-bar meetings. I think maybe his characterization of the meetings probably went a little beyond what might be considered as proper but I don't see any harm has been done. All right, go ahead.

The Witness: I am sorry. Will you repeat the last question?

Q. (*By Mr. Fleischut*) What progress was made at the meeting of the 14th?

Mr. Wayman: This part is objected to, because it calls for a conclusion. I think the question originally was what happened at the meeting.

Trial Examiner: Yes, what happened at the meeting.

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The Witness: On the 14th at the side-bar conference we discussed those items which were now open, and that was sections 11, 12, 13, 14 and 15.

- Q. (*By Mr. Fleischut*) What did they deal with?
- A. With seniority, the up-grading and so forth, bumping, and those sections.
- Q. What else was discussed?
- A. Two, three, 18 and 19.
- Q. What did they deal with?
- [162] A. Two dealt with the union shop. Three dealt with check-off. Eighteen dealt with superseniority for officers, and nineteen dealt with superseniority for stewards. Now it could be that way, or it could be the other way on 18 and 19, but 18 and 19 dealt with superseniority for officers and stewards.
- Q. Had agreement been reached on these sections before?
- A. Well, I understood agreements had been reached on these sections before.

Mr. Wayman: Objected to. The witness has in effect said he didn't know.

Mr. Fleischut: All right then.

Trial Examiner: Go ahead.

- Q. (*By Mr. Fleischut*) What else was discussed?
- A. On the 14th at the side-bar conference the company stated that they would need some type of protection or additional seniority for those people who had crossed the picket line.
- Q. Were there any agreements made on the 14th?
- A. On the 14th it was strictly in the talking stages. However, before we left that day Mr. Ferrell and

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I went over—we leaned over each other's shoulders and we itemized the five points that the company would give us an answer on on the following day. Both sides at that point felt we had had enough of discussion so that we understood each other's problem, and it certainly seemed like we could take [163] 11 through 15 off the table, we could arrive at some agreement.

- Q. All right, when was the next meeting?
- A. On the morning of the 15th.
- Q. What type of a meeting was this?
- A. This was also a side-bar conference.
- Q. And who was present?
- A. The same people that were present the day before—Mr. Ferrell, Mr. Schau, Ed Bordonaro and myself, and Michael Prime and Grover Stainbrook, from the mediation service.
- Q. If you will examine general counsel's exhibit number 2, do you find this meeting referred to on the 15th of May?
- A. No, I don't see it.
- Q. Did such a meeting take place?
- A. Definitely.
- Q. Where did it take place?
- A. At the mediation office here in Erie.
- Q. Did you tell us who was present?
- A. Yes.

Trial Examiner: He told us that.

- Q. (*By Mr. Fleischut*) What took place at this side-bar conference?
- A. Well, the company came in and said "Well, we think we have some agreements on seniority provisions

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"and some of these other matters," I have a note I would like to refer to on that particular day.

[164]. *Mr. Wayman:* May I inquire whether or not this is a note that you made at the time, Mr. Colella?

The Witness: Yes, sir, as a matter of fact this is the note—the paper was given to me by Mr. Ferrell and he had already described a couple of problems at the top of the page, and then at the bottom of the page I wrote, with Mr. Ferrell's approval, what was to be answered the following morning.

Mr. Wayman: May I see it please?

Mr. Fleischut: When did he give you the paper?

The Witness: On the 14th.

Trial Examiner: Just a moment.

Mr. Wayman: On the 14th, the day before?

The Witness: Yes.

Mr. Wayman: This was the meeting of the 15th?

The Witness: Right. You want me to go on?

Q. (By *Mr. Fleischut*) This is a paper given to you on the 14th, is that right?

A. Yes, he give me this piece of paper on the 14th and at the conclusion of the meeting on the 14th, I wrote the items which the company was going to give an answer on, on the following day,

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- Q. Whose handwriting appears on it?
- A. On the top, I guess—I know it is Mr. Ferrell's explanation of some moves in the department, and on the bottom [165] half is my handwriting.
- Q. Is this writing at the top of the page?
- A. No, it's—well—
- Q. Doodles, scratches?
- A. No, it is not doodles or scratches because these are supposed to signify "X", "Y" departments and so forth in the plant and we were trying to figure out how the moves would be made from department to department, and these are explanatory signs.
- Q. These are explanatory signs here above the line?
- A. Yes.
- Q. Who made the writing below the line?
- A. I did.
- Q. Now please tell us what occurred at the meeting?
- A. I will have to go back to the 14th. On the 14th when we left, we agreed that these were the issues in dispute, a wage reopeners with the right to strike or without the right to strike—2, 3, 18 and 19—
- Q. You are referring to contract sections?
- A. Contract sections 2, 3, 18 and 19. The charges and counter charges, talking about the legal action that was pending at the time and the discharges. Seniority proposals 11 through 15 which incorporated new operations, freezing of new departments and so on.
- Q. Referring to contract sections?
- [166] A. Yes.

Mr. Wayman: What numbers were they?

The Witness: Number 11 through 15, and super seniority, for the people who crossed the picket

line. On the morning of the 15th Mr. Ferrell said "Well, we have an answer for you," and he took out his copy which was similar to mine and laid mine out and said "On the wage reopeners, the company will agree to a wage reopeners with the right to strike in six months," so I checked it off. He said "We will agree to items, contract items 3, 18 and 19," and as he was referring to them I was checking them off.

- Q. (*By Mr. Fleischut*). Those are the check marks on the paper?
- A. That is correct. He said the company would be agreeable to the dropping of charges if the union dropped the counter charges.
- Q. What do you mean by charges and counter charges?
- A. There was an election pending there and the union felt upon settlement of the strike both sides should drop this legal action, and I check marked that, and then he says on the seniority proposal—we can reach agreement on the seniority as we discussed last night, just require finalizing it into the language.
- Q. What did that contemplate, the seniority proposals, what particularly was to be done in certain operations?
- A. Freezing these departments when new operations had been introduced.
- Q. Go on.
- A. At that point—no, I am sorry. I said "Well, it looks like we are going to get a settlement here today", and Mr. Schau spoke up and said "Gordon don't forget—"

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- Q. Who is Gordon?
- A. Mr. Ferrell.
- Q. Do you know who Mr. Schau is?
- A. George Schau, yes. He is an official of the company.
- Q. Go on.
- A. Mr. Schau interrupted and said "Gordon, don't forget the two sticky issues", and Gordon said "Yes, I am coming to that." He said "Now, we have a problem with the dischargees and a problem on the superseniority," which we had already indicated the union didn't like.
- Q. How many dischargees were there?
- A. Four at that time.
- Q. All right, what was the other problem besides the dischargees?
- A. Superseniority.
- Q. Go on and tell us what he said.
- A. The company said then—
- Q. Who?
- A. Gordon Ferrell speaking at the time for the company said, [168] "On the dischargees our proposal is if these people are cleared of their charges we would be willing to reinstate," I then asked "What do you mean by being cleared? If the charges were dropped would they be considered cleared," and now Schau said "Yes, of course, that's what we mean." Eddie then pointed out "Does this mean then we really don't have a problem with four people because two of them don't have any charges," and the company's answer to that—I am not sure which one it was, Gordon or George—said "Well, if they don't have any charges pending, of course, they are cleared, and if the charges on the other

two people are dropped, they would be considered cleared." So then we asked them, "Well, if we made an effort to get these charges dropped, they would be considered cleared and would be eligible for reinstatement," and Mr. Schau, in particular, said at that time "That is the thing you should do. If it was me that is what I would do as soon as possible."/ We then discussed the superseniority and in sum the company said they felt they had to have it; they had made some promises to these people when they came to work, and so we discussed this at some length, and the company—I have here a note—and the company admits it can't be moved on this issue. The union, myself in particular, told the company that I felt if they would reconsider their position on superseniority we could reach an agreement.

Q. An agreement on what?

[169] A. On the entire contract, because we felt they were giving us the opportunity to have these four dischargees reinstated if we could get the charges dropped, and there certainly seemed to be a remedy, and all of the other things, such as the 11 through 15, we had reached an agreement on, sections of the contract, and I then asked them about two, item number two, that dealt with the union shop and the company said, "Well, look —"

Q. Who said this?

A. I did.

Q. What person?

A. I beg your pardon, sir?

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- Q. Excuse me, go on.
- A. I asked the question. I said "How about section 2 of the contract," and Mr. Ferrell said, "Well, if we could reach agreement on the rest of these items section 2 wouldn't be no problem at this time."
- Q. The rest of what items?
- A. On everything else we had discussed that day. This would have meant actually as far as the contract items as such that the only thing that was left hanging was item 2 but the company indicated if we could reach a settlement that everything would be agreed to, that this item 2 would not be a problem.
- Q. Item 2 would not be a problem if what sections were settled?
- [170] A. Well, as a matter of fact, we had already agreed we could settle 11 through 15 and 3, 18 and 19. The only thing that was left —
- Q. What was holding up section 2, was my question?
- A. Well, the company felt —
- Q. What other sections?

Mr. Wayman: Let him answer.

Trial Examiner: Yes, you are getting into a discussion over this. If you want the witness to tell what happened, let him tell what happened. I think he is doing all right without this constant butting in as to who said this and who said that. I think it is clear in the record, otherwise you get him off on these tangents.

The Witness: Two was not contingent on anything else. It was just as if we could arrive at a complete settlement on all of the other issues also, this

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would not be any problem. This would be all right as it was in the present agreement.

Trial Examiner: Two is the union shop?

The Witness: That is correct, sir.

Q. (By Mr. Fleischut) Did you participate in any further side-bar conferences after that time?

Trial Examiner: Was that the conclusion of that meeting? What was the conclusion?

The Witness: I think this is important. At the conclusion of this meeting, the union stated that on the discharges we felt this was perfectly agreeable because we had arrived at some remedy. On superseniority that the union could not accept any form of superseniority and the company suggested that we take some time to think about it, and in the meantime they were going to go back and see if they could come back with anything else on superseniority. I told them if they dropped the superseniority issue, we had a complete agreement, so we then recessed until the morning of the 18th. On the morning of the 18th the full negotiation committees from both sides met at the mediation office. However, prior to any meeting taking place, Mr. Steinbrook called me into his office, and Mr. Ferrell was there, and he said, he said, "Well, Ange, have you come up with anything on this superseniority?" I said "No, we had spent the weekend working on the dropping of charges against those two employees who had charges pending but we certainly had no solution to superseniority, but had his position

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changed," and he said no, he says "No, our position has not changed. This is something that management people want and we must have." I told him "Well, there just can't be — this union just can't agree to any superseniority for people who crossed the picket line. This would be a violation of the thing we hold dear," and with that Mr. Ferrell said "Well, in that case, I don't think it would do us any good to meet today and we probably should recess for [172] two or three days," and we did. The meeting that morning lasted for perhaps twenty minutes, or half an hour from the best of my recollection.

- Q. (*By Mr. Fleischut*) You may refer now to general counsel's exhibit number 2. Which item, if any, are you referring to on that list of meetings?
- A. Well, I don't find the 15th or 18th meeting here on the list. The next meeting was held I believe on the 21st. I am sorry. Yes, I do find 5/18 — May 18, 1959 — and the next meeting was held on the 22nd. That is correct.
- Q. And the 5/18 one is the meeting that never got started, is that correct?
- A. That is correct.
- Q. When did the next meeting take place after that?
- A. On the 22nd, the morning of the 22nd.
- Q. Now, what happened at that meeting, or any later meetings with the agreement at the side-bar conference of the 15th?
- A. All of the agreements reached at the side-bar conferences were then removed and we were back to May 14th, in the morning. When we met on May 22nd the union submitted a proposal in which we

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tried to take into consideration those items which had been discussed in the side-bar conference and which we felt we had reached an agreement on.

- Q. What happened to that agreement proposal?
- A. The company, as I remember it, accepted parts of it, and [173] rejected other parts of it, and made it clear that superseniority was the stumbling block in our negotiations.

Mr. Wayman: This is objected to, if the Trial Examiner please. I think that is a conclusion. That may or may not be correct. As nearly as possible, the words spoken might be important at this point on this item.

Trial Examiner: Yes. Of course, the witness should relate just what each party said, not each party, but what each side said insofar as he can recall. In other words, state the union's position and the company's position.

Mr. Wayman: Ordinarily, some of these other things, there isn't any harm in a very general statement, but I think on this point I would like to know as nearly as possible what was said.

Trial Examiner: It strikes me superseniority is the main issue.

Mr. Wayman: Certainly the main issue in this case but not the only issue.

- Q. (*By Mr. Fleischut*) Did you participate in any further side-bar conferences?

Trial Examiner: Wait a minute. Had you finished with the May 22nd meeting?

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Mr. Fleischut: I didn't want to develop anything on May 22nd.

Mr. Wayman: Mr. Fleischut, why did you ask him [174] questions about it then? Excuse me. I should address my question to the Trial Examiner.

Mr. Fleischut: The point I made on May 22nd was the company had rejected the items of the 15th in the company's proposal of the 22nd.

Trial Examiner: I don't know if the witness testified to that. He said they accepted some and rejected some of the items. What was the conclusion of the May 22nd meeting? How did it end?

The Witness: It ended, the company told us they had a firm position on superseniority or some type of it, some type of additional seniority for those people who had crossed the picket lines, that the four discharges were still at issue, and some of the sections 11 through 15 were still open, and that 2, 3, 18 and 19 were still open. That's the best of my recollection.

Trial Examiner: All right, how did the meeting end? Did you agree to hold another meeting, or hold a side-bar conference or what?

The Witness: No, then there were more full negotiation meetings from that point until June the 3rd or the 4th.

Trial Examiner: All right, go ahead, Mr. Fleischut, take it from the conclusion of the May 22nd meeting.

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- Q. (*By Mr. Fleischut*) What was the next side-bar meeting?

Mr. Wayman: That is objected to because I haven't any [175] idea what the next side-bar meeting was, if there was one.

Trial Examiner: Overruled. The witness may answer.

The Witness: At the next side bar conference which took place on June 4th and 5th, or 3rd, 4th and 5th —

- Q. (*By Mr. Fleischut*) You may look at general counsel's exhibit number 2 and see if you can identify those meetings if they appear thereon.

A. The 3rd, 4th and 5th there were side-bar conferences. We met on the 3rd and we again discussed sections 11 through 15, although I think by this time 14 had been taken from the table. I think we actually discussed 11, 12, 13 and 15. We discussed this in some detail and at some length and finally at the end of the 4th we reduced or had by that time had reduced to writing everything we understood that was so on sections 11, 12, 13 and 15, and we also had reached an agreement on 3, 18 and 19. There are some copies around, which I don't have at this time of what transpired the 4th, the 3rd and 4th.

- Q. By that agreements which you were reached?

A. Agreements which were reached and typed and both sides had them.

- Q. May the witness see general counsel's exhibits 17, 18, 19 and 20? Can you identify these?

A. Yes, I can.

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- Q. Let the record indicate the witness is examining [176] general counsel's exhibits 17 through 20. What are they?
- A. These were the agreements reached on the 4th of June. I initialled them and Mr. Ferrell initialled them for the company and it does say the agreements reached, sections 3, 18 and 19, section 11, 13 and 15. These were the agreements reached on the 4th.
- Q. Did you mention section 2 before?
- A. No, I didn't.
- Q. Was section 2 agreed to on that date?
- A. No section 2 was not agreed to on that date. Then we came back on the 5th. Mr. Shioleno was present on the one of the 5th and when we started this meeting Mr. Ferrell stated that they had to make a change now in section 11 which ha dalready been agreed to the night before, and I as much as said what more do you want from us? We have given in on nearly every point and it just looks like someone here is trying to prolong the strike," and I said "Whose idea is this to ask for changes in section 11 now this morning?" I said, "Is it you, Louie?"
- Q. Who is Louie?
- A. Mr. Shioleno. He is also a company official. I believe he is the manager or general manager of the electronic division, and Mr. Shioleno said "Now, look, I am getting blamed for a lot of things but if it wasn't for me," he says, "we could have replaced every employee in that plant," and he [177] banged the table and he said "it was only me that prevented the company from doing this." He said "We have over three hundred applications on hand and the company is all set to replace but I stopped it because I don't

want to break this union in spite of what some of these union people think." He said "Isn't that right, Gordon?"

- Q. To whom was he addressing his remark?
- A. To both — well, he answered responsive to me.
- Q. Who is Gordon?
- A. Mr. Ferrell.
- Q. Did Mr. Ferrell reply?
- A. No, Mr. Ferrell did not reply. He just didn't answer and we then began to talk about section 11 any way. Well, at that point I said "Well, it seems —" then we did finally agree to section 11, and at this point I said "Well, look, so there will be no misunderstanding perhaps we had better initial these copies today," so on those sections that we agreed to on the day before we wrote 6/4/59, and then on the — as a matter of fact — yes, that's what happened on 6/4/59, and the other one we put 6/5/59 on section 11 and also we made two changes. I can remember one more thing which gave me the impression that Mr. Shioleno had at least recognized some of our mutual problems and he, as a matter of fact, signed a section which Mr. Shioleno agreed to with us, and this is the other change.

[178] Q. On what page is the section 11 agreement, general counsel's exhibit number 17, does the initial changes occur?

- A. On Page one.
- Q. I refer you to marginal remarks, "LJS" and the date, is that what you are referring to?
- A. Yes.

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- Q. That's where Mr. Shioleno signed?
- A. Yes, and he also wrote the date on the bottom part, the bottom part here is where Gordon Ferrell signed.
- Q. The 6/5 and then the "G"?
- A. Yes, that's right.
- Q. I am directing your attention to the negotiating session of May 28th.. Do you find that on general counsel's exhibit number 2?
- A. Yes, I have.
- Q. Do you recall any specific statements made that day concerning superseniority?
- A. There were many statements made on superseniority. Can I refresh my memory by going to some of my notes?
- Q. Yes.
- A. This is on the 28th? Yes, on May 28th there was some discussion as to who the people were that had crossed the picket line. The company stated that people who had returned to their former jobs, there wouldn't be any problem. However people that had been on lay off or new hired would [179] need some additional seniority and they stated that as a strike settlement the company would want some superseniority for these people who crossed the picket line, and they then said the company now wants to add a flat number of years for these people for the purpose of lay off and rehiring with no exceptions. As the talk continued—then we said what do you mean by a flat number of years and they said "From looking over the picture, it looks like we will need twenty years," so the company wants to add twenty years to their seniority. I asked them, I said "Well, does this mean that if a new person has been in the

plant for a period of two weeks, that he will receive an additional twenty years," and the company said yes, and I said "How about probationary? Aren't they probationary in accordance with prior contract provisions," and they said we will decide that but for all intents and purposes they will have twenty years added to whatever they presently have today and as a matter of fact the company now makes us a demand upon the union, the company demands that we prior to any strike settlement that these people must have twenty years of superseniority added to their—

- Q. Did they indicate any flexibility on that point?
- A. As a matter of fact, from memory, I think they told us they were immobile on this issue, and they could not move. Here it is. I have a note on it where the company admitted [180] that they were immobile and I have it in quotes, that the company had made some firm commitment to these people.
- Q. In what regard had they made firm commitments to them?
- A. They told us the commitments they had made to these people was they had told them upon the settlement of the strike that they would not be laid off?
- Q. Did they at other times propose other forms of superseniority?
- A. Yes, they did. There were four or five different proposals. I would say that the first proposal was, first they needed some kind of superseniority, and then they come back and said they wanted seniority equal to the greatest seniority in the department, and then they said they wanted a flat number of years, and then they said they wanted twenty years, and then another time they were talking about a red circle for

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these people, but at all times there was no question but what they wanted superseniority, and it was to be—they just wanted superseniority in one form or another.

Q. Well, now, have you exhausted your recollection of the events of the 28th?

A. Well, only one other thing, that the company would not be willing to compromise on this superseniority but it would only be used for layoffs and recalls, and then that date—at the meeting on that day, there seemed to be some conflict [181] between the company committee. Mr. Ferrell said this would only be for the purpose of lay off and rehire, recall, and that they would only be permanent replacements on the job, and one of the other members of the negotiating committee—I think it was Mr. Shioleno said they were not permanent replacements on the job, that they were fixtures with this company, and "we intend to see that they have a job."

Q. May I see your notes? Directing your attention to a remark at the bottom of page two of your notes of the 28th, does that refresh your recollection?

A. Yes, it does. In the discussion of superseniority, the company stated that they would not be willing to settle on any half measure and especially on superseniority issue, so the union at this point—

Q. Who is the union? Who is speaking?

A. I believe it was Mr. Copeland at this time who said "Well, if we are willing to tear up the entire contract and give it back to you and start from scratch, would you then be willing to move off from the superseniority," and they said "No, we are not going to move off the superseniority," and then we recessed.

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Q. I am now directing your attention to the events that transpired on or about June 24th and 25th. Do you recall telephone conversations, if any, with company negotiators [182] about that period of time?

A. Well, on June 24th we had a side-bar conference—I am sorry. We started off with a negotiation session and in the afternoon we had a side-bar conference, and during the recess this thing came about. Mr. Coyne was there in the morning, and he had made some proposals on settlement of the strike, and returning to work, and we just couldn't seem to arrive—at least the company was willing to accept anything we proposed at that time. We had suggested that we return to work and leave these two issues for further discussion, the issue of the dischargees and the superseniority, but the company just would not accept this, so during the recess—

Q. What day is this now?

A. On the 24th, June the 24th. During the recess we again went into a side-bar conference. We then began to discuss some way to arrive at an agreement that day. The union certainly felt it was imperative that something had to be done that day.

Mr. Wayman: That is objected to, what the union felt.

Trial Examiner: Yes, that may go out. Just tell us what happened at the meeting.

The Witness: On the 24th I asked the company if we could get this thing settled. We were willing to do anything at all to get it settled and we discussed the possibilities of a moratorium.

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[183] Q. (*By Mr. Fleischut*) A moratorium on what?

A. A moratorium as far as the strike—no, I am sorry. The moratorium was as far as granting superseniority to any person who might cross the picket line, and that the union would withdraw its pickets immediately. The company said they felt if we withdrew the pickets that certainly the climate would be a lot better for attempting to arrive at a full agreement, so we discussed four or five problems, and there is a copy of that around too, in fact it would refresh my memory on that, but any way the agreement arrived at was the union would immediately withdraw its pickts, that the union, was willing to agree that the superseniority issue would be resolved by the National Labor Relations Board, that discussion would be held on the now five discharged employees. The company made a proposal on Karpinski and Skiba, I think—yes, I am sure it was, and so in our proposal we incorporated the five but said in no event will disciplinary action be for more than what the company had already proposed. Any way, the last sentence was the company would agree a moratorium would be granted—it would be on the grant of superseniority for those people who had crossed the picket line. While discussing the thing we called in our secretary to type this out, and even while she was typing it out, the company made suggestions as to what the language should be. This was a joint effort to reach [184] a settlement. There was no question about that. As a matter of fact, Mr. Shioleno dictated the very last paragraph about how the grant of superseniority, the starting of superseniority, how it should be worded.

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Even during this conversation we said "Look, now, have there been any people hired today? Is the company attempting to replace people today?" And telephone calls were made from Mr. Stainbrook's office to the plant and the question was asked about how many people had crossed the picket line and also that no one should hire any more people while this thing was being considered, so we walked out that day and we told the company we would immediately withdraw the picket line and that they would give us an answer the following day. Mr. Ferrell said "Well, look, let's set a tentative meeting for tomorrow morning at ten o'clock."

- Q. What date would that be?
- A. The 25th.
- Q. Of what month?
- A. June 25th, "but in the event we need any more time, we will let you know; we will notify the mediator and let you know but in any event the meeting will be held no later than the 26th." So we left the building and immediately went to the plant and withdrew our pickets, told them to get off the picket line and get down to the office, there would be no more picketing from that point on. We called the newspapers, [185] television and radio in order to make sure that none of our pickets appeared at the plants. We just wanted to make sure that nothing could possibly happen that the company would be able to say "Well, look, you have pickets there." We just made every effort possible to make sure this agreement was carried out. We just had no choice as a matter of fact. We were at the point where we had to settle. The strike was over, for all intents

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and purposes, and we were dead. We didn't have the pickets on most of the time and when we did we had either one or two there.

Trial Examiner: Suppose you go ahead and tell us what happened after that. You withdrew the pickets.

The Witness: All right, we withdrew the pickets and we went back to the office. About seven-thirty that evening I got a call from Gordon Ferrell and Gordon Ferrell said, "Ange, I don't know how so say this but when we got back to the company I ran into a buzz saw. Management knocked my ears off, the deal is off." I said "What do you mean the deal is off? It can't be. We have already withdrawn our pickets," and he said "Well, the only thing I can tell you is you had better put your pickets back on because we don't have a settlement." I told him this was impossible, that we had taken the company at its word, we had withdrawn the pickets and we didn't intend to put the pickets back on. He then told me he said "Well, we will see what can be done, [186] and I will call you back tomorrow morning at the office, I will call you sometime around nine-thirty or ten o'clock." That's what happened on the day of the 24th.

- Q. (*By Mr. Fleischut*) Did the union ever agree to superseniority?
- A. No, we never did.
- Q. What was the final disposition—

Mr. Wayman: That also is objected to as a conclusion but I think the document in the record will

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speak for itself more eloquently than the witness.
This is perhaps not terribly important.

Trial Examiner: His answer may stand. Overruled.

Mr. Fleischut: No further questions.

Trial Examiner: Suppose we take a ten minute break. While you are on the witness stand don't be talking to any of the other witnesses in the case.

(Recess.)

Trial Examiner: All right the hearing will be in order. Go ahead, Mr. Wayman.

Mr. Wayman: Before I begin my cross examination of Colella I am going to ask the general counsel to produce for me any affidavit that Mr. Colella may have signed in connection with this case.

Mr. Fleischut: I think it would be proper procedure if you asked the witness did he sign one and give it to the [187] general counsel.

Mr. Wayman: All right, Mr. Colella, did you sign an affidavit and give it to the general counsel?

The Witness: Yes, I signed an affidavit.

Mr. Fleischut: You are now asking for production of that affidavit?

Mr. Wayman: I am, indeed.

Mr. Fleischut: Let the record indicate I am now presenting Mr. Wayman with a thirty-eight page affidavit signed by Mr. Colella.

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Mr. Wayman: Now I have this very thick batch of papers in my hand. I will require sometime to study them, of course, but even before I study them, I notice that the paper I have is headed "I, Edward F. Bordonaro," on the first page but on the last page it is signed by both Mr. Bordonaro and Mr. Colella. Mr. Colella, apparently you signed the same affidavit, identical affidavit that Mr. Bordonaro signed, is that correct?

The Witness: That is correct.

Mr. Wayman: May I have just a few minutes to examine this, sir?

Trial Examiner: We will take a five minute recess then while you are reading that.

(Recess.)

Trial Examiner: All right, the hearing will be in order. [188] Go ahead, Mr. Wayman.

Mr. Wayman: I should like to ask the Trial Examiner's permission to have some time over the lunch period to examine the affidavit supplied me by Mr. Fleischut at my request, and I think perhaps it might save time—it is now eleven-fifteen approximately—if we were to come back about one-fifteen. I think I could examine the affidavit rather completely by that time.

Trial Examiner: Is that satisfactory to you, Mr. Fleischut?

Mr. Fleischut: Yes.

Trial Examiner: All right, we will take a little early and an extended lunch hour today. We will be

back at one-thirty. That will give you plenty of time.

(Whereupon, at 11:15 o'clock, a.m., a recess was taken until 1:30 o'clock, p.m.)

[189] (Whereupon, the hearing resumed, pursuant to the taking of the recess, at 1:30 o'clock, p. m.)

Trial Examiner: The hearing will be in order.

Mr. Fleischut: I do not believe the witness is in the court room.

Trial Examiner: We are all ready bu. no witness. Here he is. Go ahead Mr. Wayman.

ANGELO COLELLA resumed the stand, was examined and testified further as follows:

CROSS EXAMINATION

- Q. (By Mr. Wayman) Mr. Colella, before we adjourned for an extended lunch period I think I asked you whether or not you made an affidavit and gave it to the general counsel, and I think you said you did. Is that right?
- A. No, I said I signed one.
- Q. You signed an affidavit but you didn't make the affidavit?
- A. Excuse me. There was an affidavit prepared for Mr. Hope and it was a joint effort of both Mr. Bordonaro and myself, and this is the document that I signed.
- Q. Now the affidavit you signed covered meetings before May 13th, didn't it?
- A. That is correct.
- Q. But you did not attend any of those meetings?
- A. No, I did not.

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[190] Q. Now as a matter of fact you were not in Erie prior to the 13th of May?

- A. I was in here on May 10th or 11th.
- Q. So you have no knowledge as to whether or not the information contained in this affidavit, no personal knowledge as to whether or not the information contained in this affidavit prior — in meetings prior to May 13th is correct?

A. That is correct.

Q. I am going to show you the affidavit and there are several questions I would like to ask you about it. Would you please turn to page 18? Do you have page 18?

A. Yes, I do.

Q. Will you look at the paragraph numbered 69, towards the bottom of that page?

A. Yes.

Q. Now as I understand that paragraph it says "Before recessing we discussed the five following issues: One, seniority as it applied to bumping, upgrading and lay off; two, wage reopeners; three, the four discharges; four, legal action, and, five, superseniority for scabs." Is that what it says?

A. That's what it says.

Q. And again as I understand the affidavit it related to the meeting of May 14th, is that right?

A. That related to the side-bar meeting on May 14th, that's [191] right, sir.

Q. These were the five issues that were open at that time?

A. Well, I think what actually happened there was that, when we recessed, we had reached some agreement on those five issues among the parties at the meet-

ing but the company was then going to take it back — that is the company representatives were going to take it back and discuss it with management and come back with an answer the following day.

- Q. May I ask what agreement you had reached on superseniority?
- A. On superseniority there was no agreement, sir.
- Q. Now if I remember your testimony correctly, you said the company agreed with you on a wage reopener. Did you say that?
- A. As a matter of fact, what actually happened there is on one point the wage reopener was point one, and when the company come in on the following morning, as I remember it, they said "we will agree to a wage reopener and we will also go along with the right to strike."
- Q. You think they said they would go along with the wage reopener with the right to strike? Are you sure that wasn't without the right to strike?
- A. No, I remember that because prior to that the two or three meetings I had been in to the company had taken the position they would not go along with the right to strike. However, on the morning of the 15th in my notes — I don't have them now but they will indicate when we left it was just the [192] wage reopener but when the company came back the following morning it says "we will be willing to grant the wage reopener with the right to strike," and I might say this took us back abit and even more so when we reported to the full negotiation committee that the company is willing to day to grant a wage reopener with the right to strike, which prior to this —

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- Q. That didn't happen, did it?
- A. I beg your pardon?
- Q. The contract did not contain such a wage reopener?
- A. It happened on the 15th.
- Q. I am saying the contract does not contain such a wage reopener?
- A. No, it does not.
- Q. Now if you will look at general counsel's exhibit 2, which is a list of meetings, as I recall you said there was a meeting on the 15th but the exhibit does not show a meeting on that day; is that right?
- A. No, it does not.
- Q. And is it your testimony that in addition to the meetings shown on there, there should be shown a meeting off the record or side-bar meeting on the 15th?
- A. Yes, sir.
- Q. So that the number of meetings instead of being fifty-two should be fifty-three?
- A. I don't know how I should answer that — fifty-two, or [193] fifty-three, more or less. I don't know.
- Q. In any event, there should be one more meeting added?
- A. Yes, the meeting for the 15th.
- Q. In the course of your testimony, you said that in this meeting of the 15th Mr. Ferrell said if you could reach agreement on everything else that you could agree on this section to the union shop. Do you remember that?
- A. Yes, this took place in both the 14th and the 15th. When we recessed on the 14th items 3, 18 and 19 had been in principle agreed to and we thought we had reached an agreement on section 2 also in principle

that this would not hold up the settlement if we could arrive at an agreement on everything else.

Q. All right, now, if I made everything else include this superseniority that we are discussing —

A. Our proposition on the 14th, the company asked us to consider something for superseniority and we in turn told them that they maybe should consider something. The superseniority thing we told them we couldn't agree to it and we asked the company if they could come back without that particular proposal or if they would be willing to drop it.

Q. Now if I may get this clear in my own mind and in the record, everything else did include the superseniority question, did it not? When you said everything else you included superseniority?

[194] A. As having an agreement on?

Q. As having to be settled?

A. Yes.

Q. Will you now look at page 19 of this affidavit, this joint affidavit. If you will please look at the last sentence of paragraph 72, and I refer particularly to this part of the sentence, "We felt with the settling of the strike that all of the employees should be retained in line with their real seniority." Did you express that to the company at that meeting?

A. Yes, I did.

Q. And did this not mean that all of the replacements who had been hired would have to go?

A. What we said at that time was the company had brought up this problem of having people in the plant and wanting to give them superseniority. We told the company that we couldn't agree to superseniority and instead we would agree once the strike

was terminated or ended that all of the employees would return in line with their seniority.

Q. Now do you remember my question? Do you think you have answered it?

A. I think I have, yes, sir.

Q. Did your answer mean that your position was that all of the replacements had to go out of the plant?

A. Well, what we said about the replacements at that time was [195] that in effect within a time, yes, they should all go out of the plant.

Q. Within what time?

A. Within some period of time.

Q. What period of time did you express?

A. At different times we talked about two to three months, or six months.

Q. How much did you say on this particular day we are discussing here? This is the meeting of—the sidebar conference apparently on May 15th. Did you specify any time?

A. I think we made it pretty clear to Mr. Ferrel that we as the union could not accept superseniority in any form for these people. We asked them—we told them we recognized they may have a problem the way they already had some people back to work but superseniority wouldn't be anything we could do.

Q. Mr. Colella, I don't think the question calls for that answer.

A. I am sorry. I misunderstood the question.

Q. All I want to know is at this meeting on the 15th you expressed any time within which the replacements had to go, or afterwards replacements had to go, if you know. If you don't know, say so.

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- A. Let me check my notes. I think there was some discussion [196] concerning a period of time.
- Q. Did you say anything about a particular period of time at this meeting?
- A. I can't recall.
- Q. All right.
- A. I can't recall, sir.
- Q. Now if I may, I will ask you whether or not your proposition was that those who had been replaced would come back to work with the seniority they held prior to the beginning of the strike?
- A. Those that had been replaced would come back to work at the end of the strike? Is that what you said?
- Q. That's right, with their seniority.
- A. Yes.
- Q. That was your position?
- A. Our position was that upon the completion of the strike everyone would return in line with their seniority. As a matter of fact this is what the company indicated to us also, that even though they may have had some replacements—
- Q. I just asked you your position?
- A. This is how we arrived at who was to come back.
- Q. I don't think I asked you how you arrived at it.

Trial Examiner: Just answer the question.

The Witness: I am sorry.

- Q. (By Mr. Wayman) Your position was, those whoever the [197] company had replaced, whoever they might be, had to come back to work?
- A. That is right.
- Q. And that was your position right through to the end of the strike, was it not?
- A. That would be correct.

Q. Would you please look at page 21 of this joint affidavit. Paragraph 81 which is at the top. Is it not correct, as that statement seems to indicate, that at the meeting of May 23rd Mr. Ferrell gave you the number of employees in the bargaining unit who were presently working?

A. That seems to be my recollection, sir, yes.

Q. In other words, this statement in the affidavit is correct?

A. I believe it to be, yes.

Q. Will you now refer to paragraph 83 on that same page. Have you read paragraph 83?

A. Yes, I have.

Q. Paragraph 83 contains what purports to be a quotation of a statement by Mr. Ferrell, is that right?

A. I am sorry. 83, yes that is right.

Q. Would you read that quotation for us please, and tell us if that is correct, a correct statement of what Mr. Ferrell said?

A. You want me to read it?

Q. Will you, please?

[198] A. "Mr. Ferrell then said 'I want to make it clear that this position, superseniority is not taken simply as a bargaining point for leverage in order to resolve something else. The company is serious in its desire to see these people continue to work, that some provision be made for them'."

Q. Is that a correct statement of what Mr. Ferrell said, to the best of your recollection?

A. Yes.

Q. The particular words that he spoke?

A. To the best of my recollection that is correct.

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Q. If you will look at page 21 paragraph 85 I see that that deals with the company's statement regarding the information as to the names of people who had been replaced, is that correct?

A. That is correct.

Q. Did Mr. Ferrell tell you why he was not providing that information at that time?

A. Without even turning the page I think he said "I think I know what you mean; we don't have to give you this information because of Oklahoma Rendering case."

Q. Did you know the case to which he was referring?

A. No, I am not a lawyer, sir.

Q. Did you refer it to your lawyer to find out?

A. Yes, we did.

Q. Did he tell you what that was?

[199] A. I remember some discussion about it.

Q. Will you look now at page 22, paragraph 86, and will you read for us the last three sentences of that paragraph where it begins with—will you begin with where Mr. Ferrell had made a statement?

A. Mr. Ferrell had made a statement "We are not here to bargain on the superseniority issue." Mr. Colella asked 'In other words, you won't move, that this is your final position.' Mr. Ferrell then said 'this is our final position. It will have to be—there will have to be a provision for those people who are at work'."

Q. And this occurred at the meeting of May 28, 1959, is that correct?

A. Yes.

Q. Is that a correct quotation of what Mr. Ferrell said to the best of your recollection?

A. I believe so, yes.

- Q. Coming down to paragraph 87 on that same page, will you read us the third sentence of that paragraph beginning with "Mr. Ferrell made the following statement"?
- A. "Mr. Ferrell made the following statement 'our motive is to keep our business in operation the best way we can. We have assured people that they will not be laid off in the movement of settlement—they wouldn't be laid off as a result of the settlement of the strike, that the company [200] would provide them with some sort of provisional consideration which would assure them that they would continue to work. We told them this when they reported to work'."
- Q. Is that a correct quotation of what Mr. Ferrell said at this meeting of the 28th?
- A. To the best of my recollection, yes, sir.

[201] RE-DIRECT EXAMINATION

- Q. (By Mr. Davidson) Mr. Colella, do you recall meeting with the company on June 26th, after the pickets had been removed?
- A. Yes, I do.
- Q. Can you tell us when and where the meeting took place, and who was present?
- A. Yes, the meeting took place on the 27th, in the morning, and Mr. Bordonaro and Mr. Karpinski, along with myself, met with Mr. Ferrell and Ray Bertone at the personnel office of the plant. It was understood this meeting was not—as a matter of fact, the company told us this meeting was not for the purpose of negotiating but rather they would give us

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some information at this time concerning replaced employees.

- Q. Was this the morning after the exchange of the telegrams between the union and the company?
- A. That is right, sir.
- Q. Was there a discussion at that time as to the number of employees in the bargaining unit that had been permanently replaced?
- A. Yes. When we arrived in the morning we talked—well, the company presented us with I believe four forms.

Mr. Wayman: Four what?

The Witness: Four pieces of paper, some typewritten forms—I guess four pieces of paper and then we asked them [202] about who were the people replaced, and this is what we were going to be there for. They told us both on the 23rd, 24th and on the morning of the 26th that there was approximately ninety people who had been replaced.

- Q. (*By Mr. Davidson*) At that meeting you were describing they told you how many had been replaced?
- A. Ninety employees had been replaced. This is what they told us on the—well this is what they told us on the morning of the 27th—I am sorry—the 26th.
- Q. How about on the afternoon of the 26th, was there a further meeting?
- A. Yes, there was. There was a recess at about noon time and we came back about two-thirty. At that time Mr. Ferrell wasn't there but Ray Bertone was, and he then presented us with a list of names of replaced employees. We counted these people and we found a total of one hundred twenty-nine. I

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asked Ray Bertone, I said "Where does this one hundred twenty-nine come from? This morning we were talking about ninety. Where did you find these other thirty-nine people in the last couple of hours?" He said "Well, I was told to give you this, and that's it." I said "Who told you that," and he said "Gordon told me to give you this list and that's that." I said "I am going to write this down, Ray," and so I wrote it down and this is Ray Bertone—I said "Ray, is this what you are saying, we come back now two hours later [203] and you have given us a list of one hundred twenty-nine instead of the ninety we were talking about, and your answer to that is 'I was told to give you this list and that's that'." This is what took place in the afternoon.

* * * * *

[209]

RECROSS EXAMINATION

Q. (*By Mr. Wayman*) I will ask you to look at this letter which is general counsel's exhibit 7 and ask you if that is not a letter dated May 3, 1959, addressed to members of the Erie Resistor Corporation local 613, IUE-CIO?

A. Yes, it is such a letter.

Mr. Fleischut: I object to this line of questioning as not having been pursued by this witness on direct examination.

Trial Examiner: I don't know. We got very far afield.

Mr. Wayman: It was pursued on redirect.

Trial Examiner: Actually Mr. Davidson opened up a completely new line of testimony, and you went

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into another field and I am going to permit counsel to go into this.

Mr. Fleischut: Yes, sir.

- Q. (*By Mr. Wayman*) Will you look at the third paragraph of that letter please and read it for us—the fourth paragraph, I am sorry.
- Q. "We want to inform you that starting May 7th we are going to obtain replacements. You will have your right to your job only until you are replaced but not after that."
- Q. By who is the letter signed?
- A. G. Richard Fryling.
- Q. Do you know who he is?
- A. I met the gentleman yesterday.
- Q. What is his position and what was it at that time?
- [210] A. President.
- Q. Of what? The union?
- A. The Erie Resistor Corporation.

Mr. Fleischut: Having shown the connection, I withdraw my objection.

* * * * *

EDWARD F. BORDONARO, a witness called by and on behalf of the general counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: Now will you state your name for the record?

The Witness: Edward F. Bordonaro.

Trial Examiner: Where do you live?

The Witness: 519 West Sixteenth Street.

Trial Examiner: Is that Erie?

The Witness: Erie, Pennsylvania.

Trial Examiner: Go ahead, Mr. Fleischut.

[211]

DIRECT EXAMINATION

- Q. (By Mr. Fleischut) Were you a member of IUE local 613 during the strike in question in the spring of 1959?
- A. Yes, I was.
- Q. Did you hold any office in the union at that time?
- A. Yes, I did.
- Q. What office was that?
- A. President of local 613.
- Q. How long had you been president before that time?
- A. I have been president since August of 1955.
- Q. Do you presently hold an office in the union?
- A. Yes.
- Q. What office is that?
- A. Still as president.
- Q. Did you have a contract in the spring of 1959?
- A. Yes, we did.
- Q. When did it expire?
- A. March 31, 1959.

- Q. Were there any negotiations before that time for a new contract?
- A. There was.
- Q. Do you recall when they commenced?
- A. Negotiations commenced on February 10, 1959.
- Q. What, if any correspondence passed between the parties before that time?

[212] *Mr. Wayman:* I would like to object to this because that has already been in by stipulation, and certainly there is no dispute about it.

Trial Examiner: Yes, I thought much of that went in, by way of stipulation. You just want to talk about it?

- Q. (*By Mr. Fleischut*) Did you make a demand for bargaining in the letter of January 26th?
- A. Yes.
- Q. Did the company reply and also make a demand on January 30th?
- A. Yes, they did.
- Q. Do you recall what, if any, agreements were made in the first bargaining session?
- A. Yes, sections like union shop, check off, and many other sections.
- Q. Do you know the number of those sections?
- A. The number of all of the sections?
- Q. No, the sections you referred to?
- A. Section 2 and section 3 in particular.
- Q. What are they?
- A. Union shop agreement section 2 and check off agreement section 3.
- Q. You may use general counsel's exhibit number 2 to answer the questions. Was there a time when your union struck Erie Resistor?

[213] A. Yes.

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- Q. When did the strike begin?
- A. The strike began on March 31st at midnight.
- Q. 1959?
- A. 1959.
- Q. And were there bargaining sessions between February 10th and March 31, 1959?
- A. Yes, there were.
- Q. Are those the ones indicated on general counsel exhibit number 2, between those dates?
- A. To the best of my knowledge, yes.
- Q. Now I want to direct your attention to the final negotiating session before the strike commenced. Do you recall the date of that session?
- A. On March 31, 1959.
- Q. Do you recall the length of that session?
- A. Yes, I do.
- Q. How long was it?
- A. The negotiating session of March 31st commenced at eight a. m., that morning and ended at ten a. m., April 1st, a total of twenty-six straight hours of negotiations.
- Q. What, if any, tentative agreements were reached in an effort to avert the strike in that final session?
- A. Are you asking actually what agreements were made prior to the strike?
- [214] Q. If you have difficulty in recalling this you might refer to any notes or other statements you have there?
- A. I think to be correct I had better.
- Q. I am not at this point seeking a list of all agreements agreed upon but any difficult, knotty sections, knotty sections of the contract which were agreed

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upon tentatively at the last moment in an effort to avert the strike, if any?

Mr. Wayman: I am sorry. I think I am going to have to object to that because I am not sure what the answer would mean if we got it, except the witness—

Trial Examiner: I think the question is a little too vague and general, when you start talking about knotty problems, knotty provisions. I will sustain the objection.

Q. (*By Mr. Fleischut*). Did the company offer tentative agreements in the last negotiation session before the strike on what is termed the seniority sections of the contract?

A. Yes, they did.

Q. What sections are those?

A. Sections 11 through 15.

Q. Now are there any other sections of the contract entitled seniority?

A. Yes.

Q. What section is that?

A. Section 8.

Q. Now when was the next following negotiating session?

[215] A. The next negotiating session was held on April 8, 1959.

Q. Was any discussion in the April 8 session directed towards sections 11 through 15 of the contract?

A. Yes, after discussing the five remaining issues that were left unresolved at this twenty-six hour marathon meeting, the company had asked the union if they would consider to reopen some of the sections

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of the contract pertaining to seniority. I stated at that point if the company was making its own proposal in reopening these sections of the agreement made prior to the strike. The company at this point had a caucus and came back and Mr. Ferrell stated the company had no intention of reopening sections that had already been agreed to.

- Q. Were any specific reference made to sections 11 to 15?
- A. Reference, meaning why they needed it or what?
- Q. No, the sections to remain as the company offered in the last marathon session before the strike?
- A. Yes. They were to remain as they had been agreed to at the marathon session and that was the seniority sections 11 through 15 would remain as they were in the present agreement.

Mr. Wayman: I think I have to object to that question and answer as being meaningless. When he says they were to remain, it could be the witness' opinion, or could, be something somebody said. It could be his present opinion. I don't know what it means.

[216] *Trial Examiner:* I think from his testimony, the way I understand his testimony, there is no change to be made or contemplated by any of the parties in so far as section 11 through 15 and section 8 in the old agreement pertaining to seniority.

- Q. (*By Mr. Fleischut*) Is that correct, all except the last part he put in there as to section 8. I didn't say there were any agreements on section 8.

Trial Examiner: I thought you said section 8 also related to seniority.

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Mr. Fleischut: Yes, but this is not a question at this point.

Q. (*By Mr. Fleischut*). Did the company say there was no position or change in their position on 11 through 15?

A. Yes.

Q. At this session. When was the next negotiating session held?

A. April 14, 1959.

Q. What, if any, changes in position were announced at this meeting?

A. I will try my best to answer this but I would like first to state on the 8th we had five issues and two of the issues were dropped, leaving the remaining to be resolved, 6, 8 and 48.

Q. You are referring to contract sections now?

[217] A. Yes.

Q. What issues were dropped?

A. The insurance section of the contract which was section 61 or 62. I can't recall, and section 48, vacations.

Q. Now on the 14th—

Trial Examiner: Wait a minute now. What were the three provisions in issue?

The Witness: At this point it was section 6, section 8 and section 48. I am sorry—6, 8 and 48—that's right.

Trial Examiner: Just what were those provisions?

The Witness: Section 8 dealt with company prerogatives. Section 8—excuse me. Section 6 dealt

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with company prerogatives and section 8 seniority and section 48 dealt with insurance.

- Q. (*By Mr. Fleischut*) Would you like to refer to a copy of the contract?
- A. I think I had better at this point.
- Q. The contract is in evidence as exhibit number 8. What information were you referring to, what notes were you referring to, Mr. Bordonaro?
- A. I thought in answering the question I could find something in the affidavit here to refresh my memory of that particular date.
- Q. Have you found anything?

Mr. Wayman: Just a moment please. You say you have your [218] affidavit there you are looking at? You are testifying from your affidavit?

The Witness: Not necessarily, no.

Mr. Wayman: Is that the affidavit you have on your knee there you are looking at now?

The Witness: Yes.

Trial Examiner: Suppose you just put that aside? Suppose you put it up here.

Mr. Wayman: That's the affidavit you gave the general counsel, is that right?

The Witness: That's true.

- Q. (*By Mr. Fleischut*) What sections of the contract are you referring to as the remaining issues on the 8th? You may look at the contract and refresh your recollection?
- A. There were five unresolved issues on the 8th of April; namely, section 6 which dealt with—

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- Q. What does it deal with?
- A. Company prerogatives, and section 8, seniority, section 48, vacations. Section 62, insurance.
- Q. Now you have named four. Was there a fifth issue?
- A. Wages.
- Q. Now you stated I think that several of these were dropped, is that correct?
- A. Yes.
- Q. Who dropped them?
- [219] A. The union.

Mr. Wayman: Again I feel I must object to this. It is so general it can't have a whole lot of meaning. Is this some particular meeting?

Trial Examiner: As I understand it, this is the meeting of April 8th.

Mr. Fleischut: The meeting of April 8th.

- Q. (By Mr. Fleischut) Which sections remained?
- A. Section 6, company prerogative, section 8, seniority, and section 48—that's the one I get in trouble with—

Trial Examiner: You said that was vacation?

The Witness: Right, this is the one we originally dropped, vacation, and the insurance.

- Q. (By Mr. Fleischut) Wasn't wages the third remaining issue?
- A. Yes.
- Q. You have got three issues, is that correct?
- A. Yes.
- Q. Now when did you next meet?
- A. The 14th of April.

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Q. Now, if any, proposals were made at the meeting of April 14th to change, alter or amend previously settled contract sections?

A. The company—

Mr. Wayman: That is objected to as calling for a conclusion [220] by the witness as to previously settled contract. I think we can have the proposals, if there were any, and the Trial Examiner can draw his own conclusions.

Trial Examiner: I think you had better reframe that question.

Q. (*By Mr. Fleischut*) Were any contract sections reopened in the meeting of the 14th?

Mr. Wayman: That also calls for a conclusion. Why don't you just ask if there was a proposal made?

Trial Examiner: Maybe the witness understands it and it can be developed. All right, go ahead.

The Witness: The company submitted a formal proposal dealing with a supplement to the agreement touching on the seniority sections 11 through 15.

Q. (*By Mr. Fleischut*) Now I show you general counsel's exhibit number 22. Do you recognize general counsel's exhibit number 22?

A. Yes, I do.

Q. Now what is that?

A. This is a statement of position of the company, dealing with the workings of the plant and so forth. This was actually a written article on a discussion

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that the company had, stating what their intent was.

- Q. Is this the document you referred to before I presented it to you?

[221] A. No.

- Q. Was it something else?

A. Yes.

- Q. Was it in written form?

A. It also was in written form.

- Q. To your knowledge, is that document in evidence, that written paper the company presented on the 14th?

A. I don't believe it is.

- Q. What did it call for?

A. It called for a freezing of new departments where new products were introduced, and it also designated the existing departments in the plant as being frozen.

- Q. What relation did this have to the sections 11 through 15?

A. Only to the extent there were provisions made for frozen departments, and also for designated departments.

- Q. Did it have an impact upon 11 through 14, 15?

A. This was aside from sections 11 through 15.

- Q. Did it deal in or with a similar or different subject?

A. I would say a similar subject.

- Q. Did the company say they were reopening sections 11 through 15 at that time?

Mr. Wayman: This is objected to. I think there must be a limit to the amount of leading.

Trial Examiner: I will over rule the objection. You may [222] answer.

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The Witness: Could I have the question re-stated?

- Q. (By Mr. Fleischut) Did the company reopen sections 11 through 15 on April 14th?
- A. As such? They did not.
- Q. Have you exhausted your recollection on this matter, Mr. Bordonaro?
- A. Just about.
- Q. Would reference to any papers you have refresh your recollection?
- A. Very possible.

Mr. Fleischut: May the witness examine his statement, sir?

Mr. Wayman: I think it improper for the witness to examine an affidavit given to the general counsel. If he has notes he made at the time of the meeting, that might be something else.

Trial Examiner: Do you have any notes you made at this meeting?

The Witness: This was made from my original notes.

Trial Examiner: Do you have your notes made at the meeting?

The Witness: I do not.

Trial Examiner: It is in the record here there was a joint affidavit submitted to the general counsel by the witness and also signed by Mr. Colella. You did sign such [223] an affidavit, is that correct?

The Witness: I did.

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Trial Examiner: You may point out sections to him. I don't believe you may just hand him the affidavit and let him take over.

Mr. Fleischut: May he refer to his statement concerning the meeting of April 14th to refresh his recollection as to what took place at that time?

Trial Examiner: All right, go ahead, Mr. Fleischut.

- Q. (*By Mr. Fleischut*) Was there any discussion of super-seniority on the 14th?
- A. On the 14th of April?
- Q. Yes.
- A. There was not.
- Q. I think the record should indicate the witness now is going to put his affidavit down and testify from his memory.

Trial Examiner: You mean you went through all of this and showed him the affidavit and don't even ask him a question about what happened at the meeting?

Mr. Fleischut: That's correct, sir.

Trial Examiner: Are we playing games here?

Mr. Fleischut: No, sir, I made a mistake.

Trial Examiner: Oh, oh. All right.

- Q. (*By Mr. Fleischut*) I direct your attention to the meeting of May 6th. You may refer to the general counsel's [224] number 2. Do you recall any discussions that took place on May 6th?
- A. On May 6th the company withdrew sections 11—seniority sections 11 through 15.

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- Q. Did they submit anything instead of those sections?
- A. Yes, they made a formal proposal in writing at this point.
- Q. What did it call for?
- A. It called for revisions of different sections of the contract.
- Q. I direct your attention now to the meeting of May 14th. Do you recall what took place at that meeting?
- A. Yes, I do.
- Q. What took place there?
- A. The morning session of May 14th the company commenced negotiations with not only withdrawing the seniority sections 11 through 15 but "we also are withdrawing sections 2, 3, 18 and 19." This naturally on the first part, union seniority, was a complete reversal of the company's original position taken on April 8th that they had no intentions of reopening the sections.

Mr. Wayman: The editorial comment is objected to.

Trial Examiner: I thought it was more of an argument than an editorial comment but whatever we want to call it it certainly is not testimony in response to the question.

- Q. (*By Mr. Fleischut*) Were any statements made at that [225] meeting regarding other sections tentatively agreed to?
- A. Yes. I wanted to point out that seniority sections 11 through 15 were actually agreed upon.

Mr. Wayman: This is objected as not being responsive to the question.

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Trial Examiner: Yes, give him the question again.

- Q. (*By Mr. Fleischut*) Was anything said regarding other sections of the contract previously tentatively agreed to?
- A. Yes.
- Q. What was said?
- A. There was a discussion on the reopening of other sections that were previously agreed to, sections 2, 3, 18 and 19.
- Q. Other than those sections, was there any discussion regarding withdrawal of the tentative agreement?
- A. There was as to sections on seniority 11 through 15.
- Q. Other than those were there any discussions as to withdrawal of tentative agreements on the other previously agreed to section?
- A. As far as the company was concerned at this point, they took the position that their withdrawing these sections and all other sections dealing with seniority or anything else are tentative and strictly tentative and they could be withdrawn at any time.
- Q. I am referring to May 14th now. Were there any other meetings that day?
- [226] A. There was a side-bar conference meeting that afternoon of May 14th.
- Q. Was there a discussion of superseniority at that meeting?
- A. Yes, there was.
- Q. Do you recall when the next meeting took place?
- A. The next meeting took place on the 15th of May.
- Q. What was discussed at that meeting?
- A. There again superseniority came into place and a rather lengthy discussion was had on that. Also on the 5th, the 15th, rather, there—

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- Q. If you have exhausted your recollection of what took place on the 15th you may say so.
A. I have.
Q. Would reference to any information, notes you have there refresh your recollection?
A. Yes.

Mr. Fleishut: I ask the witness be permitted to examine his statement regarding the meeting on the afternoon of the 15th.

Mr. Wayman: Which statement are we talking about?

Mr. Fleishut: The affidavit.

Mr. Wayman: I will object.

Trial Examiner: Actually, Mr. Fleischut, you treat this in a very cavalier fashion. You throw a question at him and if the witness hesitates you say well if you can't [227] remember do you want to look at your affidavit. Actually I think you might press a little more because all of this was covered by the preceding witness any how and I can follow it more or less from my notes on the preceding witness' testimony. I think you could press some more on testing the witness' recollection as to what happened, and I realize the witness is really placed in a difficult situation here where you are jumping from meeting to meeting—you are jumping from one meeting to another, and you are only covering selected, we might say, provisions that were discussed, and I think he is in a difficult position because he can follow no chronology.

Well, all right, get your affidavit.

Q. (By Mr. Fleischut) Paragraph 7.

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Mr. Wayman: I have a further objection to this question because it is obviously pure repetition. The previous witness testified specifically on this paragraph of this joint affidavit.

Trial Examiner: Yes, on both direct and cross.

Mr. Wayman: No question about it.

Trial Examiner: I suppose this is corroboration. While I am no adherent for corroboration unless it is necessary—certainly two witnesses testifying to the same incident can only be called excessive corroboration.

Mr. Wayman: I suggest it is excessive corroboration [228] when a witness has to read from a piece of paper that the other witness has been reading from.

Mr. Fleischut: I will withdraw the question.

Trial Examiner: Actually Mr. Colella did not read from that affidavit.

Mr. Wayman: I think perhaps that's true. I thought I called it to his attention.

Trial Examiner: Yes.

Mr. Fleischut: I will withdraw the question. You may close your affidavit.

Q. (By Mr. Fleischut) Do you recall any discussion concerning discharged employees?

A. Yes.

Q. Did the company make a proposal concerning discharged employees on that day?

A. Yes.

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- Q. Do you recall what that proposal was?
- A. On May 15th?
- Q. That's right.
- A. Pardon me?
- Q. On May 15th.
- A. The company stated there probably would not be—there would be no problem with two of the discharges.
- Q. Who were they?
- A. Skiba and Buren. The company also stated that on the [229] other two that the charges against them would have to be dropped before considering reinstatement. In other words, at the conclusion of this meeting the company said no problem on Skiba and Buren. If the charges were dropped against the other two, they too would be reinstated.
- Q. Do you recall when the next meeting took place? You may refer to general counsel's exhibit number 2.
- D A. May 18th.
- Q. Do you recall any discussions that took place on that date?
- A. No.
- Q. I direct your attention to the next meeting. When did it occur?
- A. May 22nd.
- Q. Do you recall what took place at that meeting?
- A. Yes.
- Q. Can you tell us please?
- A. The company again came out with their super-seniority proposals.
- Q. Did they indicate flexibility or lack of flexibility on these proposals?
- A. Lack of flexibility.

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Mr. Wayman: I feel it necessary—

Trial Examiner: I will sustain it.

Mr. Wayman: At least I feel I should put an objection on the record.

[230] Q. (*By Mr. Fleischut*) What did they say about superseniority on that date?

- A. On that date they said superseniority was not a bargainable point. They also stated they wanted to give superseniority to those employees that had crossed the picket line equal to the most senior employee in that department. As far as recalling the specific points that were made at that particular meeting, I think I would have to refer to some other document because it is very fuzzy in my mind. I am trying to remember as much as I can.
- Q. Was any discussion held at that meeting concerning sections 18 and 19 of the contract? If you don't remember, say so.
- A. Sections 18 and 19 I think a parallel was drawn for the superseniority as for officers and stewards at this meeting.
- Q. Was anything said concerning sections 2 and 3 of the contract, if you recall?
- A. I can't recall.
- Q. Do you recall when the next meeting took place?
- A. May 23rd.
- Q. Do you recall what occurred at that meeting?
- A. I recall there again that superseniority was discussed. The company renewed its adamant position on superseniority. I have exhausted any recollection without referring to my affidavit.

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- Q. Was there any request made for information at this meeting?
- A. Yes.
- Q. Do you recall what information was requested?
- A. At this meeting the names of the employees that were replaced was requested along with the number of people replaced, and also the jobs of the—the numbers of the jobs that were taken by replacements.
- Q. Do you recall when the next meeting took place?
- A. May 23rd.
- Q. Do you recall what was discussed at this meeting?
- A. On the 23rd there was a discussion about the number of people who acted as replacements.
- Q. Do you recall what was said?
- A. The company gave the union a break-down of the number of employees that had been replaced.
- Q. Do you recall what that was?
- A. The number being eighty-three people had been replaced.
- Q. Anything else?
- A. The company stated of eighty-three people replaced, replacement of eighty-three people, that thirty-five of these people were never in the bargaining unit.
- Q. Did the company make any statement regarding knowing who had been replaced?
- A. The company stated that as far as they knew that eighty-three junior employees had been replaced. They didn't know who they [232] were, just that eighty-three junior employees were being replaced.
- Q. What date was this conversation on?

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Mr. Wayman: Pardon me, Mr. Fleischut. I am going to object at this point to the testimony the company said this; the company said that. Could we have the name of the man who did the speaking at this time?

Trial Examiner: Yes, it might be well to do that; or at least have it understood the committees were meeting. What was the date of this meeting? That was the last question.

The Witness: May the 23rd.

Q. (By Mr. Fleischut) When did the next meeting take place?

A. May the 28th.

Q. Do you recall what took place at that meeting?

A. I recall that the company submitted their proposal on superseniority, namely the twenty year plan entitled to recall to work after the strike.

Q. Did they give you that?

A. They did—I can't recall—

Q. I am going to show you general counsel's exhibit number 35 and ask you if you can identify it. I am handing the witness general counsel's exhibit number 35. Do you know what that is?

A. Yes.

Q. What is it?

[233] A. It is the twenty year superseniority, plan entitled recall to work after the strike.

Q. Was any request made for information at this meeting on the 28th?

A. Yes.

Q. Please tell us what happened?

A. The union requested the names of those employees who had been replaced. The company at this time

refused to give us the names of these employees replaced based on an NLRB decision of the Oklahoma Rendering case.

- Q. When did the next meeting take place?
- A. The next meeting took place on May 29th.
- Q. Do you recall the discussions on this date?
- A. There again in talking about superseniority and the twenty year plan it was asked of the company if they considered this a demand or a proposal and Gordon Ferrell stated he could go further and say this was not a proposal but a program set up, and in effect.
- Q. Do you recall the time an agreement—strike that. In meetings after that date do you recall any discussion on superseniority?
- A. After the 29th?
- Q. Yes.
- A. Yes.
- Q. How frequently was it discussed at meetings?
- [234] A. Very often.
- Q. Could you tell us how many of the meetings it was or was not discussed at?
- A. I think—not think, but I would say practically every meeting from the 28th on. In fact to the best of my recollection I would say from the 14th on, to the very end.

Mr. Wayman: May 13th?

The Witness: May 14th.

- Q. (By Mr. Fleischut) Were there any discussions at later meetings concerning discharged employees?
- A. Yes.

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Q. Were there proposals made other than you have already described?

A. Yes.

Q. Will you describe what they were?

A. Well the company reversed their position on the reinstatement of discharges, Buren and Skiba and Grafius.

Mr. Wayman: I would like to have an objection to the conclusion the company reversed its position. I think it ought to be an automatic one, as it appears this is going to be said pretty frequently.

Trial Examiner: Yes, all right.

Q. (By Mr. Fleischut) Could you enumerate for us any other proposals made concerning discharged employees?

A. The company proposed these employees would have to be [235] cleared by the National Labor Relations Board before they would be entitled to reinstatement. This is what I meant by a reversal of their original position on this matter.

Q. Did they take any position on those who did not have formal charges placed against them?

A. Yes.

Q. Will you describe what that was for us?

A. They changed their position at different times. Later on in negotiations it was from no reinstatement or from reinstatement to no reinstatement without being cleared.

Q. Cleared what?

A. On charges.

Q. What charges?

A. Brought about by arrests made of some of the company employees.

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- Q. Did the company take a position as to those who the criminal charges had been dropped against?
- A. Yes, they said—originally they said these people would be reinstated but then they said these people would not be reinstated.
- Q. During the course of negotiations did the company offer different forms of superseniority?
- A. Yes, they did.
- Q. Will you describe what they were, for us?
- A. The company proposed to give seniority equal to the most [236] senior employee in the plant to those who have crossed the picket lines. They changed that to the most senior employee in the company, changed it to the most senior employee in the department, changed to twenty years additional seniority, changed to seniority equal to—the same as officers and stewards, changed to red circle.
- Q. What's red circle?
- A. The only way I would know how to describe red circle is that there are two categories of people involved; one which is a preferred list and another group which is people with actual seniority to be used in the event of lay offs and recalls.
- Q. Did the union ever agree to superseniority?
- A. No, they did not.
- Q. What did the strike settlement provide concerning superseniority?

Mr. Wayman: I have to object to his interpretation of a document that is already in evidence. This is a question that has to be decided by the Trial Examiner and the Board.

Trial Examiner: Yes, I will sustain the objection to that.

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- Q. (*By Mr. Fleischut*) When did the strike end, Mr. Bordonaro?
- A. The strike ended on June 24th.
- Q. Other than the exchange of telegrams on the 25th did you request on behalf of the employer reinstatement of the strikers?
- [237] A. Yes, I did.
- Q. When did you do that?

Mr. Wayman: Objected to as calling for a conclusion, as something that has to be decided by the Board. I think we have the letters in evidence and telegrams in evidence and some conversation, and if there is another paper I suppose we could have it too.

Trial Examiner: Yes, I know there are documents and telegrams that have been received in evidence. You can state what, if anything, the witness did in this respect, or with respect to any application for reinstatement, or whatever you have in mind.

- Q. (*By Mr. Fleischut*) Other than the telegrams and letters in evidence did you make any application for the replaced strikers, as a group, for reinstatement?
- A. Other than the telegrams and the letters I sent? I would state that personal contact—
- Q. Well, tell us what happened and when.
- A. The exact date?
- Q. No, approximately, if you can't remember the exact date.
- A. Soon following the termination of the strike I had asked the company to reinstate the—

Mr. Wayman: I am going to object to that.

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Trial Examiner: You will have to fix a date on that.

Mr. Wayman: I think we should have the date and the person [238] to whom he talked.

Trial Examiner: Yes, that's right.

Mr. Wayman: Otherwise, there is no way at all of my checking this.

Trial Examiner: I agree with you. They will have to fix the approximate date and the person.

Q. (*By Mr. Fleischut*) Whom did you speak to concerning reinstatement, Mr. Bordonaro?

A. Mr. Ferrell.

Q. And what did you say?

A. We had asked the company to reinstate the employees.

Mr. Wayman: This is objected to. I don't think it is responsive to the question.

Trial Examiner: No, it isn't. What did you say to Mr. Ferrell?

The Witness: I have a hard time of separating the thing as to the date.

Trial Examiner: Actually you haven't even fixed the date yet but I assume we are coming to that later. Can you recall your conversation with Mr. Ferrell?

The Witness: Yes. We asked Mr. Ferrell—

Q. (*By Mr. Fleischut*) Who is we?

A. For the union.

Edward F. Bordonaro—Direct.

Q. Who is speaking?

A. I am speaking. Let me say this, that on June 24th [239] I had asked for reinstatement of the employees. This is pretty tough to answer.

Trial Examiner: Well, if you don't know, you will just have to say you don't know, and do the best you can.

Q. (*By Mr. Fleischut*) You don't recall.

A. This is a general question as far as I am concerned because there have been times—

Trial Examiner: Now, wait a minute. You are not arguing your case here. You have been asked a question. Did you talk to Mr. Ferrell about reinstatement of these employees? Now just limit your answer to that question.

The Witness: I will have to say in answer to the question on June 24th a union proposal was drawn up—rather I would say a paper was drawn up jointly between the company and the union, whereas the union asked that the people which still have status of the company—it was done on the 24th of June; in the same document there existed the last point of the moratorium and this is what I am referring to when I say this is when we asked the company to reinstate the employees.

Q. (*By Mr. Fleischut*) Is that what you are referring to in your letter when you wrote in December?

A. No.

Q. What were you referring to in the letter?

A. I would like to refresh my memory on this by looking at the [240] document itself?

Edward F. Bordonaro—Direct.

Q. All right, general counsel's exhibit 36.

Trial Examiner: All right, I think the witness has refreshed his recollection from reading the letter. Now, let's have some questions.

The Witness: I have no recollection of any discussion preceding this letter.

Q. (*By Mr. Fleischut*) Other than those you previously described during the negotiations?

A. Yes.

Mr. Wayman: This is objected to. The witness says he has no recollection concerning discussions, and counsel asked him about some discussion referred to before.

Mr. Fleischut: Just his previous answers.

Mr. Wayman: Well, all right, I suppose the record is clear.

Trial Examiner: See if you can straighten it out.

Q. (*By Mr. Fleischut*) Did you ask for reinstatement during negotiations?

A. Yes.

Q. Did the company reinstate the employees?

A. No.

Q. Mr. Bordonaro, were you replaced after the strike—at the plant before the strike ended?

A. On June 26th, yes.

[241] Q. Were you told who your replacement was?

A. On June 26th, yes.

Q. Who was your replacement?

A. Frank Lambrick.

- Q. Do you know Frank Lambrick?
- A. No.
- Q. Would you recognize him if you seen him?
- A. Yes.
- Q. What department in the plant did you work in?
- A. Department 10.
- Q. Which building is that in?
- A. In the south plant.
- Q. During the course of the strike did you see your replacement go into that plant?
- A. No.
- Q. Do you know if he worked on your job during the strike?
- A. No, sir.

Trial Examiner: How would the witness know that if he was on strike?

- Q. (By Mr. Fleischut). Do you know if he worked on any jobs during the strike?
- A. Yes.

Mr. Wayman: Just a minute, please.

- Q. (By Mr. Fleischut). How do you know that?

Mr. Wayman: There was a question asked if he saw the [242] man go in the plant, which was never answered at all.

The Witness: I said no to that. I didn't see him go into the plant. I didn't see him entering the plant. I saw him in the plant.

- Q. (By Mr. Fleischut) Did you see him in the plant?
- A. Yes.
- Q. The plant where you had worked previously?
- A. Yes.

Edward F. Bordonaro--Direct.

- Q. Did you see him in that plant throughout the strike?
- A. I can only recall once seeing him.
- Q. Did you ever see him other places during the strike?
- A. No.
- Q. Do you know if he worked on other jobs during the strike?
- A. Yes.

Mr. Wayman: Listen—

- Q. (*By Mr. Fleischut*) How do you know that?

Mr. Wayman: This is objected to because clearly it is going to be hearsay.

Trial Examiner: Just where did you get this knowledge of him working in the plant, and working on particular jobs in the plant, when this witness is on the outside?

The Witness: You want me to answer?

- Q. (*By Mr. Fleischut*) Mr. Bordonaro, could employees other than those replaced during the strike and laid off after the strike have suffered a reduction of wages because of the [243] superseniority policy?

Mr. Wayman: I will have to object to that too.

Trial Examiner: I suppose anything could happen. I will sustain the objection.

Mr. Fleischut: No further questions.

Trial Examiner: We will take a ten minute break, and don't talk to any of the people during the recess because you are still on the stand.

(*Recess.*)

Edward F. Bordonaro—Direct.

Trial Examiner: The hearing will be in order.
Mr. Davidson, do you have any questions?

Mr. Davidson: Yes.

- Q. (By Mr. Davidson) Mr. Bordonaro, I show you charging party's exhibits 1 through 3. Have you seen those before?
- A. Yes.
- Q. Can you tell us under what circumstances?
- A. Yes, these are the drop-out cards sent in to the local's office requesting that they be dropped from the rolls of the membership.
- Q. Were you present in the local office when these were received?
- A. Yes.
- Q. Do you recall approximately what date these started to come into the local office?

Mr. Wayman: This is objected to.

[244] *Trial Examiner:* Overruled.

The Witness: I would say that commencing on July 1st a great many of these were received by the office.

- Q. (By Mr. Davidson) Did you on some occasions retain the envelope in which the cards were sent in to the local office?
- A. I did.
- Q. What did you do with the envelopes that you retained?
- A. I attached it to the card, the drop-out card.
- Q. With a staple?
- A. Yes.

Edward F. Bordonaro - Direct.

- Q. And are those the envelopes attached to the exhibits identified as charging party's 1 and 2 envelopes which you attached?
- A. Yes.
- Q. And you did this in the case of others as well?
- A. Yes.
- Q. Did you notice anything particularly about the envelopes which you were attaching?
- A. Yes, I did.
- Q. What was the feature that you noticed?
- A. Some were received at the office, the drop-out cards, in Erie Resistor envelopes marked with Erie Resistor emblem which identified this envelope going through the Erie Resistor stamp machine.
- Q. Some of those are the envelopes that you attached?
- A. Yes.
- Q. Have you received such envelopes before?
- A. Yes.
- Q. And in what—from whom have those envelopes come in the past?
- A. General correspondence with the company, namely, Gordon Ferrell or Mr. Bertone.
- Q. Did you collect all of the cards that were submitted in this fashion that came in the mail, withdrawal cards?
- A. Yes.
- Q. Did you any time look through them to analyze the dates which they bore?
- A. Yes.
- Q. Can you tell us approximately how many of them were dated and received prior to July 17th?

Mr. Wayman: This is objected to. I think the cards themselves would be the best evidence.

Edward F. Bordonaro—Direct.

Mr. Davidson: I will be glad to put them all in.

Trial Examiner: I think you might have a period fixed there, and sort of wholesale this: I will give a continuing objection to this line of testimony.

Mr. Davidson: I will be happy to try to shorten this. Can I drop putting them all physically in evidence but permit the witness to take a look at them and give us an estimate from them?

[246] *Trial Examiner:* You can hand them to him on the stand. You have quite a batch there. Has he counted them before or examined them before?

Mr. Davidson: I believe he has.

- Q. (By Mr. Davidson) Have you examined all of these cards before?
- A. I have.
- Q. Have you examined them particularly with respect to the dates that they bear?
- A. Yes.
- Q. Do you recall how many of them are dated prior to July 17th?
- A. Yes.
- Q. How many?
- A. One hundred seventy-three were made out prior to July 17th.
- Q. When did you make this analysis or count?
- A. Shortly after all of the cards were in.
- Q. Approximately how many were dated after July 17th?
- A. Approximately seventeen cards.
- Q. Of those dated prior to—was that July 17th?
- A. Yes.

Edward F. Bordonaro—Direct.

- Q. Can you tell us in what dates the bulk of them fell?
A. The bulk of the cards came in dated July 1st and 2nd.
Q. Did all of the cards which came in Erie Resistor Company envelopes have an Erie Resistor stamp on them?
[247] A. No.
Q. Some of them bore regular postage stamps?
A. Right.

Mr. Davidson: I would like to introduce just a few representative cards with attached envelopes.

Mr. Wayman: You have had three marked already. I suppose you will introduce those?

Mr. Davidson: Yes, and I will mark these four.

(Thereupon, documents were marked charging party's exhibit 4, for identification.)

Mr. Davidson: I would like to offer in evidence charging party's exhibits 1 through 4 in evidence.

Mr. Wayman: May I take a look at them please?

Mr. Davidson: Sure.

Mr. Wayman: I would object to the admission of these exhibits as being incompetent, irrelevant and immaterial.

Trial Examiner: I will over rule your objection, in view of the testimony that has previously been received concerning these cards, and they may be received in evidence as charging party's exhibits 1, 2, 3 and 4.

Edward F. Bordonaro—Direct.

(The documents heretofore marked Charging party's exhibits 1, 2, 3 and 4, for identification, were received in evidence.)

Trial Examiner: These cards you have identified were withdrawals from individuals who were members of the local?

The Witness: Yes.

[248] Q. (By Mr. Davidson) Mr. Bordonaro; I know it is difficult to pick out one from a number of these meetings but would you see if you can recall the meeting of May 23rd between the union and the company. You can refer to general counsel's exhibit number 2 if you want to put that meeting in focus. I believe you testified on direct examination there was discussion at this meeting as to the number of people employed as replacements in the plant. Do you recall any remarks made—first, let me ask you who Shioleno is?

A. Who he is?

Mr. Wayman: May we have that spelled please?

Mr. Davidson: I think probably Mr. Bertone can spell it.

Trial Examiner: All right, let's have it spelled.

Mr. Shioleno: S-h-i-o-l-e-n-o.

Q. (By Mr. Davidson) Will you tell us who Mr. Shioleno is?

A. Plant manager of the electronic division.

Q. Was he present at the meeting of May 23rd?

A. Yes.

Edward F. Bordonaro—Direct.

- Q. Can you recall any remarks he made in discussion of the replacements working in the plant in the course of the May 23rd meeting?
- A. Yes, there was a discussion on who the replacements would be. The replacements would be put on lay off in line with their seniority. They in turn would be called back to work [249] in line with their seniority.
- Q. Was Mr. Shioleno asked who the replaced employees were?
- A. Yes.
- Q. Do you remember what his response was?
- A. Mr. Shioleno said he didn't know.
- Q. Was he asked what jobs they held?
- A. Yes.
- Q. Do you remember what his response was to that?
- A. Could I have that question again please?
- Q. Do you remember what his response was to the question what jobs the replaced people held?
- A. He said he didn't know, I think.

Mr. Wayman: This is objected to.

Trial Examiner: I think you have already answered the question unless this is an explanation of it and I don't see how it could be if Shioleno said he didn't know.

- Q. (*By Mr. Davidson*) Do you recall further discussion at the May 28th meeting as to the identity of the replaced employees?
- A. We had asked first who the replaced employees were. We were refused this information on the 28th. We also discussed the junior employees of the plant—may I strike that. I don't want to state on that.

Edward F. Bordonaro—Re-Direct.

Trial Examiner: Well, it stays there. If you want to withdraw it or change it, you may.

The Witness: Okay.

[250] Q. (By Mr. Davidson) Do you recall a meeting with Mr. Ferrell's office on the morning of June 26th after pickets had been withdrawn from the plant?

A. Yes.

Q. Do you recall who was there?

A. Yes.

Q. Do you recall what the nature of the discussions at that meeting was? What was the purpose of this meeting?

A. The meeting on June 26th was made clear by the company this was not for purposes of negotiations but rather to submit the names of the ninety people who had been replaced.

Q. Was there any discussion at this meeting as to how the strikers were to be returned to work?

A. Yes.

Q. Can you return what was said in this discussion and by whom?

A. I can't recall exactly but Mr. Ferrell made the statement that morning. He said the people, the striking employees who had status with the company would be called back to their former classification, this in effect meaning a recall out of seniority order.

Q. Did you make any request of Mr. Ferrell at this time?

A. We asked Mr. Ferrell at this time on the 26th reinstate all of the employees that were working on March 31st.

Edward F. Bordonaro—Cross.

[251] Q. Was this a request that had been made previously, prior to the end of the strike?

A. Yes, we—yes.

Mr. Davidson: That's all.

Trial Examiner: Go ahead, Mr. Wayman.

Mr. Wayman: I have one or two questions of Mr. Bordonaro.

CROSS EXAMINATION

Q. (*By Mr. Wayman*) First of all, I should like to look at general counsel's exhibit 34. Mr. Bordonaro, this is a paper that has already been introduced into evidence and identified by Mr. Ferrell, but it appears to bear your name. Will you look at this document and see if that is your signature. Is that your signature?

A. It is.

Q. And do you recognize this document?

A. I started to read it. May I read it?

Q. Why sure.

A. Yes.

Q. Now this appears to be a letter written on the letter head of International Union Electrical, Radio and Machine Workers, AFL-CIO, and signed by you. Can you tell us to whom this letter was sent? Not that particular paper, but what was your mailing list?

A. Striking employees that crossed the picket line.

Q. Any striking employee that crossed the picket line, is [252] that right?

A. Yes.

Q. Thank you.

Trial Examiner: The date of this letter is what, Mr. Bordonaro?

The Witness: May 6th, 1959.

Q. (By Mr. Wayman) You say it was mailed on or about that date, to any striking employee who crossed the picket line?

A. Yes.

Q. Was it mailed to any employee who said he might cross the picket line?

A. Not to my knowledge.

Q. He or she?

A. Certainly not.

Q. I think when you were testifying about a meeting of June 24th you said a paper was drawn up that contained a proposal or some kind of an arrangement dealing with the termination of the strike. Do you recall that?

A. Yes.

Mr. Wayman: I am going to ask that this paper be marked respondent's exhibit 1, I suppose.

(Thereupon, a document was marked Respondent's exhibit 1, for identification.)

Q. (By Mr. Wayman) Will you look at this paper that has [253] been marked for identification as respondent's exhibit 1 and tell us what that is, if you recognize it?

A. Yes, I recognize the document.

Q. Can you tell us what it is?

A. It is a union proposal dated June 24, 1959.

Edward F. Bordonaro—Cross.

Q. Is that the paper to which you had reference in your testimony?

A. Yes.

Q. Now there appears to be inserted in the typed copy some writing in ink in item number one. Will you tell us, if you know, who supplied that writing?

A. I don't know.

Mr. Wayman: I am going to offer in evidence respondent's exhibit 1, minus the ink writing which we haven't yet identified.

Trial Examiner: That document is not signed, is it?

Q. (*By Mr. Wayman*) The document is not signed, is it, Mr. Bordonaro?

A. No, it is not.

Q. This is a proposal made by the union?

A. Correct.

Trial Examiner: A union proposal.

Mr. Davidson: You are offering that I assume without the marginal pencil notations?

Mr. Wayman: Without the marginal pencil notations, [254] or at least until they are identified by someone.

Trial Examiner: Any objections?

Mr. Fleischut: No.

Q. (*By Mr. Wayman*) I don't suppose you put those pencil notations on there, did you, Mr. Bordonaro?

A. No, I did not.

Edward F. Bordonaro—Cross.

Trial Examiner: All right, the document may be received in evidence and marked as respondent's exhibit number 1.

(The document heretofore marked respondent's exhibit 1, for identification, was received in evidence.)

Mr. Wayman: May I have just a moment please?

Trial Examiner: Yes.

Q. (By Mr. Wayman) Mr. Bordonaro, referring to general counsel's exhibit number 34, you will remember that was the letter of May 6th that you signed. Approximately how many of those did you send out?

A. I never collected any data on that. I never kept a running account of the number of letters I sent out.

Q. There were several however were there not?

A. Several meaning more than two, I would say yes.

Q. Mr. Bordonaro, do you know where the stamp or mailing machine of Erie Resistor is kept?

A. Today?

Q. Well, today. Can you tell us?

A. Not today.

[255] Q. You don't know where it is kept today?

A. No.

A. Where was it kept back on March 31, 1959, if you know?

A. I know it was kept in the shipping and receiving departments.

Q. By whom was it operated?

A. By a number of people.

Edward F. Bordonaro--Re-Direct.

- Q. Was it operated by bargaining unit employees?
A. Yes.

Mr. Wayman: I have no more questions.

Trial Examiner: Any redirect?

RE-DIRECT EXAMINATION

- Q. (*By Mr. Fleischut*) In respondent's exhibit number 1, I show you that again, and direct your attention to number 2, the union agrees to maintenance of membership proposal.

Mr. Wayman: I can't hear what you say.

Trial Examiner: Keep your voice up.

- Q. (*By Mr. Fleischut*) Union agree to maintenance of membership proposal as agreed to earlier today. Do you recall that?

A. Yes.

- Q. When did the union agree for the first time to maintenance of membership instead of union security clause if you recall?

A. I can't recall.

- Q. Do you recall if a maintenance of membership agreement in some form was agreed to before that date?

{256} A. Well—

- Q. If you don't recall, you may say so?

A. I don't recall.

Mr. Fleischut: That's all.

Trial Examiner: Do you have anything, Mr. Davidson?

Mr. Davidson: I would like to ask a question with reference to the same exhibit.

Edward F. Bordonaro—Re-Direct.

Q. (By Mr. Davidson) Can you recall where this document was typed?

A. Yes.

Q. Can you tell us?

A. The document was typed in the Federal mediator's office, at his typewriter, I think.

Q. Can you recall who composed the document?

A. I think it was—it was a joint effort between the company and the union, namely, Mr. Shieleno and Mr. Colella.

Mr. Davidson: That's all.

Mr. Wayman: You say this was a joint effort but it is headed union proposal and not signed by anybody, is that right?

The Witness: That's right.

Mr. Wayman: I have no further questions.

Trial Examiner: All right, you may step down.

(Witness excused.)

* * * * *

[262] ETHEL GUIANEN a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: Will you state your name for the record, please?

The Witness: Ethel Guianen.

Trial Examiner: Are you Miss or Mrs. Guianen?

The Witness: Mrs.

Trial Examiner: Where do you live?

The Witness: 917 Pennsylvania Avenue, Erie, Pennsylvania.

DIRECT EXAMINATION

Q. (By Mr. Fleischut) Directing your attention to the Erie Resistor Strike of January, 1959, were you employed at the Erie Resistor Company, in the bargaining unit, before the strike?

A. Yes.

Q. Were you one of the strikers?

A. Yes, I was.

Q. Now, at that time did you have any capacity in the union?

A. Yes, I was secretary.

Q. As secretary of the union, do you attend union meetings?

A. Yes.

Trial Examiner: You mean secretary of 613?

[263] Mr. Fleischut: 613 of the IUE.

Q. (By Mr. Fleischut) The striking local, is that the union you belong to?

A. Yes.

- Q. And is that the union you were secretary of?
- A. Yes.
- Q. Now, in the course of your duties as secretary of the union do you maintain a book of records of the meetings?
- A. Yes, I did.
- Q. Is it your duty, as secretary, to make regular entries of the meetings in your minute book?
- A. Yes, it is.
- Q. Now, I direct your attention to the meeting of May 29, 1959. Would you open your minute book and examine your minutes of that meeting? Have you located that page?
- A. Yes.
- Q. Do your minutes for that meeting of May 29th indicate any motions made or acted upon regarding the strike?
- A. Yes.
- Q. Would you please tell us what that was?
- A. Motion made and passed unanimously that until Management stops its unfair labor practice by making us agree to giving super-seniority to the scabs that we continue our strike. Do you want the names of the people? Who gave the motion and who seconded it?
- [264] Q. Yes.
- A. It was made by Seth and seconded by Grafius.
- Q. Thank you. You may close your minute book. As secretary of the union, did you attend any of the negotiating sessions of the company during the strike?
- A. Yes, I did.

Ethel Guianen—Direct.

Q. Did you attend the meeting of May 23rd?

A. Yes, sir.

Q. I direct your attention to that meeting. Do you recall any statement made by Mr. Ferrell at that time concerning the company's knowledge of who had been replaced?

A. Well, quite early in the meeting Mr. Ferrell said everything at the shop was in a mess, sales, office work, paper work, everything was all screwed up. They didn't know what their replacement program was because they didn't know the situation of things, themselves. Didn't know what the eventual outcome would be because everything was so mixed up they just didn't know.

Q. Did they say they knew who had been replaced?

A. No. They stated it would be the junior ones who had been working as of March 31st, would be the ones who would be replaced.

Q. And did he make any statement concerning what the disposition of these replaced people would be?

Mr. Wayman: I think I'll object to the leading questions [265] because the witness seems to have a pretty good recollection and is able to answer the question without assistance from counsel.

Trial Examiner: Yes. I think it's all right to point out the particular subject you want to cover with this witness, but I think the witness can tell, can testify as to what took place at this meeting, insofar as that particular subject is concerned.

Q. (By Mr. Fleischut) In narrative form, explain what Mr. Ferrell said to you.

A. Mr. Ferrell said it would be the junior people who were working as of March 31st, that they would be

Ethel Guianen—Direct.

on lay-off. And he also stated that this replacement had not been done on an individual basis.

Q. Now, I direct your attention to the meeting of June 23rd. Did you attend that meeting?

A. Yes, sir.

Q. Do you recall any remarks of Mr. Shioleno at that time?

A. I believe before Mr. Shioleno spoke Mr. Coyne had asked him if the proposal the company had made as of I believe May 28th, regarding super-seniority—not super-seniority, but giving these people who had crossed the picket line twenty years seniority, and Mr. Shioleno said that it is not a demand of the company; it is the policy of the company. And Mr. Coyne said "Does it mean a settlement of the strike, the [266] demand?" And Mr. Shioleno said "It is not a demand. It is a policy. We are already doing it. We are giving them twenty years."

Mr. Fleischut: No further questions.

Trial Examiner: Do you have any questions,
Mr. Davidson?

Mr. Davidson: No, sir.

Trial Examiner: Go ahead, Mr. Wayman.

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- Q. (*By Mr. Wayman*) Could I just look at the minutes of the meeting of May 29th to which you testified?
- A. Yes, sir.
- Q. Miss Guianen, prior to the motion and the vote on this subject I assume there was some discussion or report by one of the union officers?
- A. Yes.
- Q. Who made the report to the membership on this subject of the so-called super-seniority?
- A. President Bordonaro.
- Q. Do you have that recorded in your minutes also? The substance of his report?
- A. Yes.
- Q. Would you be kind enough to read us the paragraph that consists of his report to the membership and apparently which resulted in the motion?
- [267] A. There are several here. Shall I read all of them?
- Q. Pardon?
- A. There are several here. Shall I read all of them? Which one do you want me to read? There are several reports regarding seniority.
- Q. No. The so-called super-seniority. The others appear to deal with other parts of the contract, is that right? You tell me which one does deal with super-seniority that we have been talking about, and just read that part, if you will.
- A. "The company has reduced its demand for super-seniority for scabs. They have reduced their demands from super-seniority to a flat twenty years

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additional seniority for scabs. For example, if a scab has five years service he would automatically be rewarded with an additional twenty years, making a total of twenty-five years service. Of course, the seniority would not entitle these loyal employees to additional vacation benefits that go with seniority."

- Q. Is that all?
- A. That I think would about everything that pertains to the twenty years. Right in here.
- Q. Oh, I see where it is.
- A. The rest does not pertain to the twenty years.
- Q. All right. Thank you.

Mr. Wayman: I have no more questions.

Trial Examiner: Any redirect?

[268] *Mr. Fleischut:* No.

Trial Examiner: Miss Guianen, did the union take a strike vote before they went on strike?

The Witness: Yes, they did.

Trial Examiner: Can you tell me what were the strike issues?

The Witness: Before the strike?

Trial Examiner: Yes. What were you striking for?

The Witness: A better contract, and at that time the seniority, at that time even, was in issue.

Trial Examiner: How about wages?

The Witness: Wages? Yes. Insurance.

Trial Examiner: There has been testimony here at various times there were five issues, and I was just wondering if you knew the strike issues.

The Witness: The five issues at the time of the strike, at the very beginning—you ask me when we

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took the strike vote—the strike vote was taken before these final five issues.

Trial Examiner: Yes, I understand that.

The Witness: That's where I wasn't sure.

Trial Examiner: I was trying to help, but maybe I confused you. Can you just tell us generally what the strike issues were when the local went on strike?

The Witness: When we walked out?

Trial Examiner: Yes.

[269] *The Witness:* Wages, insurance, subcontracting. I can't remember, because we dropped two or three of them very shortly afterwards.

Trial Examiner: You mentioned something about seniority? Was that an original issue?

The Witness: Yes, that was an original issue.

Trial Examiner: Those were at least the principal issues, is that right?

The Witness: Yes.

Trial Examiner: All right, that's all. You may step down.

Do you have any questions on the subject document?

Mr. Wayman: No.

Trial Examiner: All right, you may step down.

Mr. Wayman: I think that is important, but perhaps we can develop that a little more fully through one of our witnesses.

Trial Examiner: I meant to ask one of the witnesses yesterday, but I overlocked it.

(Witness excused.)

Gordon D. Ferrell—Re-Direct.

Mr. Fleischut: The company has another document that wasn't prepared at the time Mr. Ferrell first appeared, but I would like for him to take the stand to identify that document.

Mr. Wayman: We can stipulate what this is.

[270] *Mr. Fleischut:* I want to ask him a few questions about it.

Mr. Wayman: All right.

GORDON D. FERRELL a witness called by and on behalf of the General Counsel, having been previously duly sworn, was recalled, examined and testified further as follows:

Trial Examiner: Just have a seat, Mr. Ferrell. You have already been sworn as a witness in this hearing, and you are still under oath.

Mr. Fleischut: My records indicate the document which Mr. Ferrell is going to present should be numbered General Counsel's Exhibit 43.

Trial Examiner: Forty-three is the next one.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 43 for identification.)

RE-DIRECT EXAMINATION

Q. (*By Mr. Fleischut*) Mr. Ferrell, in response to my subpoena for a list of all of the people who have been laid off in the bargaining unit since the end of the strike, you have prepared General Counsel's Exhibit 43?

A. Yes.

Gordon D. Ferrell--Re-Direct.

Q. I notice the names are in the left column; and the center column entitled "Seniority Date", that is the person's date of [271] accrued seniority, is that correct?

A. Yes.

Q. And the right hand column indicates the date they were laid off, is that right?

A. Yes, sir.

Q. I see the last—

Trial Examiner: Is this after the strike commenced?

Mr. Fleischut: After the strike was over.

Trial Examiner: After the strike terminated?

Mr. Fleischut: That's correct.

Q. (By Mr. Fleischut) Is that correct, Mr. Ferrell?

A. That's correct.

Q. I notice the last two pages also has a list there entitled "Plus twenty years". What does that indicate?

A. This indicates that these were former employees who came to work during the strike who had the seniority date listed, but they also had the twenty years added, as far as—which came into play when they were subject to layoff.

Q. These people got the twenty years super-seniority?

A. Yes.

Q. But the list indicates their actual date of accruing seniority?

A. That is correct.

Q. Does this list incorporate everyone in the bargaining unit who has been laid off since the strike?

[272] A. Yes.

- Q. It is my understanding that in the ordinary course of your business you lay people off and recall people almost every day, is that correct, because of the nature of the business?
- A. That's correct.
- Q. Does this list include people who are laid off one or two days and then called back or is it merely a list of those who are currently laid off and have been laid off since the end of the strike?
- A. This is a list of the names of all of those who have been laid off during or since the end of the strike. They may have been laid off and called back and laid off again, but their name will only appear once.
- Q. That wasn't the point of my question. The point was are all of these people currently laid off?
- A. Are they all currently laid off?
- Q. Yes.

Mr. Wayman: If you know.

The Witness: I don't know that.

Trial Examiner: All right.

- Q. (By Mr. Fleischut) Does the list incorporate anyone who was laid off, for example, one day last August and September and has worked ever since? Would that person's name appear on this list?
- [273] A. Yes. You asked for every one. The name of everyone who had been laid off during the interim.
- Q. At any time.
- A. And the names are on the list.
- Q. Even though only for a day or two, is that correct?
- A. Yes. Without regard to the length of time they were on layoff.

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Q. Or whether they are currently on layoff?

A. Correct.

Q. I would like now to direct your attention to the exhibit, General Counsel's Exhibit Number 32. Thirty-two is a list of replaced people and replacements and so forth. I have in my possession, Mr. Ferrell, another list which is similar to this, provided by the company, but the information contained thereon is not exactly the same.

Mr. Wayman: This is objected to.

Mr. Murphy: Are you testifying?

Mr. Wayman: Is counsel testifying?

Q. (By Mr. Fleischut) Have changes been made on this list from time to time?

A. Which list?

Q. The information contained in General Counsel's Exhibit 32?

A. This list?

Q. Yes.

[274] Mr. Wayman: I am going to have to move that the remarks of the General Counsel, regarding the list he is supposed to have, be stricken because there is an inference there that is unfair to this witness and prejudicial to our case.

Trial Examiner: I will let it stand, at this time, anyhow.

Mr. Fleischut: I think I can correct it with the next question or two.

Mr. Wayman: I think reference to that list, your list or some list not in evidence, is going to

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provoke rather loud objections. I have a feeling the witness has probably forgotten the question by this time.

Trial Examiner: To be frank with you, I didn't get the last part of the question, myself. What was your question?

Mr. Fleischut: Let me strike it, sir.

- Q. (By Mr. Fleischut) What is the date of the preparation of the list, Mr. Ferrell?
- A. This particular list?
- Q. Yes.
- A. There is no date on it, but this was the list with the August date, as I recall, that you requested.
- Q. Now, with reference to the column indicating "request for reinstatement": which I believe is the second column from the left, is that correct?
- A. This is the date they applied for reinstatement, yes.
- [275] Q. And when a person applies for a reinstatement is a record made of their application?
- A. Yes.
- Q. Will you recheck the information on that list for us with your personnel department to ascertain if additional requests for reinstatement have been made?

Mr. Wayman: Let me interpose here. I don't think this is proper examination on this document. If it is a request that we recheck the information which, as anyone can see, something written in pen on a list which was originally typed, we will be glad to recheck any information and supply it. I don't see how this witness can answer a question like that on the stand.

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Trial Examiner: The document has already been received in evidence as General Counsel's Exhibit Number 32, and now you are just blandly asking the witness would he mind checking everything on this list?

Mr. Fleischut: Only with regard to those who are listed as not having requested reinstatement.

Trial Examiner: How many names are on that list?

Mr. Fleischut: There are eighteen on that list, as indicated, that have not requested reinstatement.

Trial Examiner: What is your basis for making such a request?

Mr. Fleischut: I believe it is in error.

[276] *Mr. Wayman:* I will say right now, as counsel for the respondent, that if somebody made a request for reinstatement at a date later than is shown on this list we would not conceal the fact from the General Counsel if it became pertinent, but the list provided is as accurate as we can make it as of the time it was prepared.

Mr. Fleischut: That is all I want, Mr. Wayman. That the list will be rechecked, and any errors ascertained will be brought to my attention.

Mr. Wayman: Now, Mr. Fleischut, you are talking about whether or not some of these people that are shown on there as not having requested reinstatement might have requested reinstatement subsequently, and you want us to check that?

Mr. Fleischut: That's right.

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Mr. Wayman: I tell you we will check at your request. Not because we have to, but because we are willing to cooperate if it becomes pertinent; but I don't think that is a proper question on this exhibit.

Mr. Fleischut: All right, I will take your statement at its worth.

Mr. Murphy: May I suggest Mr. Fleischut—if he has eighteen names he wants rechecked—that he give us the eighteen names so we can check it?

Trial Examiner: That's what I was going to suggest. If you are suspicious of any of the names give them the names.

[277] *Mr. Fleischut:* I would like to have all of those indicated as not having requested reinstatement checked.

Trial Examiner: Yes, that's a very easy way for you to get rid of the problem. Sure. Just drop it in somebody else's lap.

Mr. Murphy: That's the way all of these exhibits were prepared. Mr. Fleischut had every one of them in his files, but he asked us to make four copies to produce for him. Let him tell us what he wants, and we will get it.

Mr. Fleischut: I'd like to have that list of names rechecked.

Trial Examiner: The eighteen names?

Mr. Fleischut: The names of those who have not requested reinstatement according to the witness.

Trial Examiner: How many are there?

Mr. Fleischut: I believe there is eighteen.

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Trial Examiner: As I understand, counsel is willing to do that.

Mr. Wayman: We have no objection to doing that. I suppose they are the ones that are marked with an "N"?

Mr. Fleischut: Or an "NT".

Trial Examiner: Just what grounds do you have for raising this?

Mr. Fleischut: At least one of the individuals that is listed there as not having requested reinstatement said he [278] went to the office and made application for reinstatement.

Mr. Murphy: May we have the name so we can check it?

Mr. Fleischut: Wilford Hamm.

Mr. Murphy: Was this allegedly after this list was given to the Labor Board?

Mr. Fleischut: I don't know, sir. I don't know.

Mr. Wayman: We have no objection to checking to see if Mr. Hamm made a request for reinstatement. I don't think we are required to do it, and I don't think it is a part of this case, but we don't mind cooperating to that extent so we can move along.

Trial Examiner: All right; as long as you agree to do it or volunteer to do it, all right. I suppose it would not take too long to do that.

Mr. Wayman: I can't answer that because I don't know where these files may be.

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- Q. (*By Mr. Fleischut*) Mr. Ferrell, in granting super-seniority to some employees, does that have a relative effect on all employees?

Mr. Wayman: Now, I'm going to object to that, because it has absolutely nothing to do with the limited purpose for which this witness was recalled to check this layoff list.

Trial Examiner: I thought you had finished with this witness with the exception of recalling him to get this additional information on General Counsel's Exhibit 43.

Mr. Fleischut: May I ask the question or not?

Trial Examiner: The witness can give his opinion on it. That's all it is.

The Witness: Would you restate the question, please?

- Q. (*By Mr. Fleischut*) Granting super-seniority to some employees, does it have any relative effect on all employees?

A. On all employees? No, sir.

- Q. It does for the purpose of layoff and recall, does it not?

Mr. Wayman: Now he is arguing with the witness.

Trial Examiner: You are arguing with the witness. I will sustain the objection.

- Q. (*By Mr. Fleischut*) Does it have a relative effect on all employees for the purpose of layoff and recall?

A. No, sir.

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Q. Does it have a relative effect on all employees with less seniority?

A. Yes.

Mr. Wayman: I'm going to object. I'm going to object to that.

Trial Examiner: Just what are you trying to prove on this? Super-seniority affects the layoff and recall procedures?

Mr. Fleischut: I am trying—well, that it has a relative effect on all employees with lesser seniority.

[280] *Mr. Wayman:* That's like trying to prove the moon is in the sky. We can go out and look at it.

Mr. Fleischut: The witness has answered "Yes" to the question.

Mr. Wayman: I'm objecting to the question.

Trial Examiner: It may stand.

Mr. Wayman: The witness answered before I objected.

Trial Examiner: It may stand. I will overrule your objection.

Mr. Fleischut: Now the witness may leave the witness stand. I have no further questions.

Trial Examiner: How about your exhibit 43?

Mr. Fleischut: I want it offered in evidence, yes.

Trial Examiner: Any objection?

Mr. Wayman: I have no objection.

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Trial Examiner: General Counsel's Exhibit 43 may be received in evidence and so marked.

(The document heretofore marked General Counsel's Exhibit No. 43 for identification was received in evidence.)

* * * * *

[287] *Mr. Wayman:* Counsel for the General Counsel has just shown me a paper which seems to be entitled "Erie Resistor Corporation Seniority List" and also appears to be an IBM compilation showing seniority date, name and clock number, and it does appear to be the list the company furnished the union as of March 15, 1959. There are a number of pencil or pen notations on it, which I am sure were not on there when furnished, and should be disregarded.

I would stipulate, subject to check, which I think will disclose it is correct, that this is the seniority list as of March 15, 1959, and it may be introduced in evidence. I should like a copy if I can't find one myself, but I think I can.

Mr. Fleischut: May this be accepted into evidence as General Counsel's Exhibit 45?

(The document above referred to was marked General Counsel's Exhibit No. 45 for identification.)

Trial Examiner: All right, the list may be received in evidence as General Counsel's Exhibit Number 45.

(The document heretofore marked General Counsel's Exhibit No. 45 for identification was received in evidence.)

* * * * *

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[303] *Mr. Wayman:* Now, if I understand the proposition correctly, the General Counsel would like us to stipulate to these three propositions regarding these three employees as a result of his examination of these personnel cards.

Mr. Fleischut: That is correct, sir.

Mr. Wayman: The stipulation he would like to have is this: Jean S. Good, who replaced Alice Krolak, resigned on July 17th of '59.

Hugh L. Nelson replaced Rolland Myers on Job Number 530. Myers was on Job Number 529.

Carol N. Ripley, who replaced Edith Chizmadia, quit on September 11, 1959.

* * * * *

[307] GORDON D. FERRELL a witness called by and on behalf of the Respondent, having been previously duly sworn, was examined and testified as follows:

Trial Examiner: You have been sworn before in this proceeding, and you are still under oath.

DIRECT EXAMINATION

- Q. (By Mr. Wayman) Now, Mr. Ferrell, I am sure you recall the negotiations with the IUE in 1959, do you?
- A. Yes.
- Q. When was the first meeting held?
- A. On February 10, 1959.
- Q. Will you tell us briefly, and in your own words, what transpired at that meeting?
- A. At this meeting, as usual, we began by discussing the ground rules as far as the meeting place, the

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hours we would meet, the position that each—the company and the union—took on communications during the negotiations, and, with the beginning of the exchange of proposals, we also reiterated the customary rule we had always gone by in connection with making tentative agreements on sections as we went through the contract, with the understanding, of course, that none of these became binding and final until it was a complete agreement on the entire contract.

- Q. Now, you have mentioned that the union and the company [308] exchanged proposals.

Mr. Wayman: I'm going to ask that this booklet be marked Respondent's Exhibit 2.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 2 for identification.)

Mr. Wayman: I would say in this connection I have only the one copy, but I will procure an additional copy so we have a duplicate in the record. I am sure the union has a number of copies of this paper.

Trial Examiner: All right, go ahead.

- Q. (*By Mr. Wayman*) Mr. Ferrell, I show you this booklet which has been marked for identification as Respondent's Exhibit 2, and ask you what that is.
- A. This booklet contains the contract proposal of Local 613, IUE, AFL-CIO, which was given to the union—or given to the company—I am sorry—by the union on the first meeting of February 10, 1959.

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Mr. Wayman: I will offer respondent's Exhibit
2. Would you let Mr. Fleischut see it, please?

And, by way of explanation, this is background. We don't intend to go into the tedious disposition of all of these various issues, but simply to show what was there at the beginning of this negotiation.

Mr. Fleischut: Admissibility is stipulated.

Trial Examiner: All right, the booklet may be received [309] in evidence, marked as Respondent's Exhibit 2.

(The document heretofore marked Respondent's Exhibit No. 2 for identification was received in evidence.)

- Q. (By Mr. Wayman) When was the next meeting, Mr. Ferrell?
- A. The next meeting following—
- Q. Yes.
- A. I will have to refer to my notes on that.
- Q. Look at General Counsel's Exhibit 2.
- A. The next meeting was held on February 17th.
- Q. I will ask you whether or not the company handed the union a set of proposals on that day?
- A. Yes, we did.

Mr. Wayman: I am going to ask this very attractive booklet be marked as Respondent's Exhibit 3.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 3 for identification.)

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- Q. (*By Mr. Wayman*) I show you this booklet which has been marked for identification as respondent's Exhibit 3, and ask you what that is, Mr. Ferrell.
- A. This is the company proposals which were presented to the union at the second meeting on February the 17th.
- Q. Now, will you explain very briefly to us how this booklet is made up?
- A. Yes. Immediately inside the cover there is a list of [310] those contract sections which the company was proposing no change on. On the second page is a list of the contract sections on which the company had proposed or was proposing changes.
- Q. Now, if you will look inside the book, I have observed there is writing on the back of some pages. Will you find such a page, and tell us the number and explain what that represents?
- A. This booklet was put together in chronological order by sections of the contract, and in each of those sections where the company had a proposal the proposal was set into the book so when the book was opened to that section the current section appeared on the righthand page and the company's proposal on the lefthand page.
- Q. You are looking at a particular page?
- A. The first example is Section 8.
- Q. What page is that?
- A. These pages are not numbered. They are by sections. That is Section 8.

Mr. Wayman: I will offer Respondent's Exhibit 3 in evidence.

Mr. Fleischut: Stipulated.

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Trial Examiner: All right, the proposals may be received in evidence as Respondent's Exhibit Number 3; the company's proposals.

[311] (The document heretofore marked Respondent's Exhibit No. 3 for identification was received in evidence.)

Q. (By Mr. Wayman) At this meeting did the union hand you a further formal proposal?

A. Yes, they did.

Mr. Wayman: I will ask this document be marked Respondent's Exhibit 4, please.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 4 for identification.)

Q. (By Mr. Wayman) Mr. Ferrell, I will show you a document or booklet which has been marked Respondent's Exhibit Number 4 for identification, and ask you what that is.

A. This was an additional proposal which the union brought in on SUB, or Supplemental Unemployment Benefits.

Q. On what date was that?

A. This is dated April 1, 1959.

Mr. Wayman: I will offer Exhibit 4.

Mr. Fleischut: Stipulated.

Trial Examiner: It may be received in evidence, marked Respondent's 4.

(The document heretofore marked Respondent's Exhibit No. 4 for identification was received in evidence.)

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[312] Q. (*By Mr. Waymar*) Mr. Ferrell, as I understand your previous testimony, you were the chief spokesman for the company in these meetings?

A. Yes.

Q. Did you have further negotiations, further negotiation meetings, with the union between February 17th and March 31st?

A. Yes, we did. A total of twenty-two in all.

Q. Mr. Ferrell, I will ask you whether or not at my request you prepared a chart showing the issues as of various dates, beginning with March 31st and continuing on through until the contract was signed on July 17th?

A. Yes, I have.

Mr. Wayman: May we go off the record for a moment, sir?

Trial Examiner: All right, off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Wayman: I will ask this chart be marked Respondent's Exhibit 5.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 5 for identification.)

Q. (*By Mr. Wayman*) Mr. Ferrell, I show you a chart which has been marked for identification Respondent's Exhibit 5, and ask you what that is.

A. This is a chart of the post-strike meetings and issues [313] during the period of the strike, from April 1st until July 17th, 1959.

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- Q. What is the source of this information you have plotted on this chart?
- A. The source of this information is my own negotiating notes taken at the meetings, referred to during the strike.

Mr. Wayman: I will offer Respondent's Exhibit 5 in evidence.

Mr. Fleischut: There is no objection to its acceptance into evidence. However, that lack of objection does not concede the accuracy of the material.

Trial Examiner: All right, the chart may be received in evidence, and marked as Respondent's Exhibit Number 5.

(The document heretofore marked Respondent's Exhibit No. 5 for identification was received in evidence.)

Mr. Wayman: For the convenience of the Trial Examiner I would like to hand him Respondent's Exhibit 5, and my procedure will be to ask Mr. Ferrell to testify regarding each of the issues set forth on that exhibit.

- Q. (By Mr. Wayman). Mr. Ferrell, the first issue which I see on Exhibit 5 is entitled "Wages". Will you tell us the situation regarding the wage issue as of March 31, 1959?
- A. Yes, sir. The union had originally asked for twenty-five cents an hour across the board. By the end of our session on [314] March 31st the union's demand for wages was nine cents an hour across the board.
- Q. Will you tell us when the next change in position by either the company or the union took place with regard to this issue?

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A. Yes. On the meeting of April 21st, the union made a proposal that the company—that they could not agree to a wage increase—if they would consider paying for the group insurance. We have a contributory plan in which both the employee pays into—a portion of the premium—and the company pays a portion. And the union's proposal was that the company pay the entire cost of the group insurance in lieu of the wage increase.

Q. Did you agree to that proposal?

A. No, we did not.

Q. What was the next proposal or change in position on this issue?

A. Two meetings later, on April 28th, the union again made a proposal to provide for a wage reopeners in a period of six months again on the assumption that if the wage increase was not possible at the present time that perhaps in six months or so things might improve to a point we would be able to do something about it.

Q. That's what the committee told you?

A. This is the discussion that took place.

[315] Q. All right, what was your response?

A. We did not agree to a wage reopeners.

Q. And when was the next change in position or proposal made on this issue of wages?

A. I might say that the union's proposal on April 28th, request for reopeners, included the right to strike or arbitrate. It was this that the company refused to agree to. Then on May 6th, to get on with this, the union next proposed that this issue be settled by arbitration.

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- Q. What was your response to that?
- A. The company's response to this was we would not agree to resolve this issue through arbitration, that we would consider a wage reopener in six months without the right to strike.
- Q. When was the next change in position or proposal on this issue?
- A. At the very next meeting, on May 13th, the company was still going to consider a wage reopener without the right to strike, and the union suggested a fact-finding board rule on this matter of wages.
- Q. Was there any agreement?
- A. There was no agreement.
- Q. What was the next change in position or proposal on this issue?
- A. There were no new proposals on either side. I am sure we [316] discussed a reopeners and the arbitration and the fact-finding board sometime between the times they were introduced and the time this issue was finally dropped.
- Q. Was the issue formally dropped?
- A. I do not find in my notes it was formally dropped. I find no discussion of it after our meeting of June 2nd. This is why I discontinued it on the chart as of that point.
- Q. In other words, there was no formal agreement? There was just simply no more discussion?
- A. That is right.
- Q. What is the next issue that you have there as of March 31st?
- A. The next issue is Sub-contracting, or Section 6.
- Q. Will you tell us—
- A. Actually the name or heading, title of this section, is "Company Prerogatives", but the particular por-

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tion of the section in dispute was that having to do with sub-contracting.

Q. What was the union's position on this point as of March 31st?

A. The union was insisting the company not farm out work or sub-contract work as long as they had employees on layoff.

Q. Did you agree to that?

A. No, we did not.

Q. What was the next change in position or proposal regarding this item?

[317] A. This issue was resolved on the meeting of April 21st.

Q. And how was it resolved?

A. At this time, after further discussions with the union, we discovered the thing that was most crucial to them was if there were people on layoff who, particularly in the skilled trades, who could perform certain repair and maintenance work, that they be called in to do this, even on a temporary basis, if it became necessary to have this work performed while they were on layoff. The company made a proposal which added a paragraph to Section 16, which is the Recall Section of the contract, to provide that we would call in employees who were qualified to do this particular kind of work, if it became available, where any of them were on layoff.

Q. Is that what happened in the contract of July 17th?

A. Yes, sir. We reached an agreement on this issue, and this took care of the problem we had on Section 6.

Q. What was the next issue you have on your chart?

A. The next issue is the seniority section of the contract. Section 8.

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- Q. Now, can you tell us what was in dispute between you and the union as of March 31st on that point, on that section?
- A. This section, much like the previous one, had one particular part of it which was in dispute. Not the whole section was in dispute. The section or the portion of the section [318] in dispute had to do with those employees which were transferred out of the bargaining unit, promoted or transferred to supervision or quality control or some other class of work which was not included in the certified bargaining unit. These people also enjoyed the right to be returned to the bargaining unit when, due to lack of work, they were no longer needed on the job to which they had been promoted or transferred. During the time they were out of the bargaining unit they accumulated seniority under the contract.

The union felt that these people should not accumulate seniority when they were out of the bargaining unit, and their request or demand was that we freeze the seniority of employees who were transferred out of the bargaining unit, and this got down to a very technical point there in the final discussions.

- Q. Let's not go to the final discussions just yet. We are at March 31st right now.
- A. This is pertinent. It got down to where quality control inspectors were the specific group the union was concerned about, because, in order to make this clear, the union recognized that supervision, under the Act, was excluded, they were excluded from representing supervisors, so they did not object to seniority being accumulated for supervisors. They

did object to it being accumulated for quality control inspectors, and this was an issue.

Q. This was the situation, as I understand it, on March 31st?

A. Yes, sir.

Q. Now, will you tell us the next date on which there occurred any proposal or change in position on this issue?

A. Of course it was discussed at all of the meetings, from the first moment, to try to resolve this further, and that occurred on April 24th. The union made a proposal at this meeting that if we were going to insist on accumulated seniority for these people while they were out of the bargaining unit then the least we could do would be to provide that the junior person in the quality control group would be transferred back into the bargaining unit whenever a reduction of force was necessary in the quality control group. This we could not do or agree to because our quality control inspectors—

Q. I don't think you need to give the reason. You did not agree to it?

A. We did not agree.

Q. When was the next change in position of the parties on the issue?

A. Because the union was taking the position we transfer these people back into the bargaining unit meant a bargaining unit employee in the end would be bumped out, and this was one of their main complaints about putting quality control people back in the bargaining unit. Because of this, the company [320] made a proposal that no bargaining unit employee would be laid off as a result of transferring

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one of these quality control people back into the bargaining unit. We thought this would satisfy the union and the problem, but it did not. It was not accepted.

- Q. When was this proposal made by the company?
- A. On April 28th.
- Q. There was no agreement on that date?
- A. There was no agreement.
- Q. When was the next move or change in position on this issue?
- A. Because this was not accepted, the company withdrew this offer on the following meeting, on April 29th.
- Q. All right. What was the next move or change of position?
- A. At the next meeting, on May 5th, the company made another proposal to the union, in which we agreed that we would freeze seniority for anyone who was transferred out of the bargaining unit in the future, but we could not agree to freeze the seniority of these people that had been moved out under the previous existing rules, which provided they be accumulative.
- Q. Was there any agreement on this proposal?
- A. No agreement was reached.
- Q. What was the next move or change in position?
- A. On May 6th you recall that the union had proposed that [321] we arbitrate wages, and, in fact, all issues, and this issue of seniority for quality control inspectors was included in this offer to arbitrate.
- Q. Did you agree?
- A. No, sir. We did not.

Q. When was the next move or change in position?

A. The next change, the next meeting was May the 11th, and again the union had proposed submitting these issues to a fact-finding board, and that concluded this issue.

Q. Did you agree on that?

A. No.

Q. When was the next move or change in position?

A. We agreed on a solution to this problem at the meeting on May 22nd, which was similar to the company's second proposal that had been made on May 5th. We agreed to freeze seniority for those transferred out in the future, and there was one additional feature, that if one of these people was transferred back into the bargaining unit they then would not bump into seniority or bump in at the bottom of the seniority list.

Q. Was this a change from your prior contract provision?

A. Yes, it was.

Q. Was this solution you agreed upon what finally appears in the contract of July 17th?

A. Yes, it is.

Q. What is the next issue you have on your chart?

[322] A. The next issue had to do with vacation, or Section 48 of the contract.

Q. And as of March 31st what was the situation regarding that issue?

A. The union was demanding three weeks' pay, three weeks' paid vacation, after ten years of service. Our contract previously had provided for two weeks' vacation after five years.

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- Q. Had you made any proposal to the union on vacations?
- A. Yes, we did. We proposed there be two weeks of paid vacation after three years.
- Q. Was this a change from your prior contract provision?
- A. Yes. It was a change from five years to three years for two weeks vacation.
- Q. Was this an open issue on March 31st?
- A. Yes, it was.
- Q. When was the first move or change in position after March 31st?
- A. I think, as already testified to on April the 8th, this issue was dropped by the union.
- Q. Did the union accept your proposal of two weeks vacation for three years of service?
- A. Yes, it did.
- Q. Is that what finally appears in the contract of July 17th?
- [323] A. Yes, sir.
- Q. What is the next issue you have on the chart?
- A. The next issue has to do with our group insurance. As I said before, this is a contributory plan, in which the employee pays a portion of the cost and the company pays a portion of the cost.
- Q. All right. As of March 31st what was the situation on that?
- A. As of March 31st the union was asking if there be any increase in the cost of the insurance during the contract year that the company would pick up the tab on the difference, on the increase.
- Q. What was the company's position on that?
- A. The company did not agree to do this.

- Q. When was the first change in position to move on this issue after March 31st?
- A. On the meeting of April 8th the union also dropped this issue.
- Q. You had made no offer on that issue, had you?
- A. I beg your pardon?
- Q. You had made no offer on this issue?
- A. Only to continue the present contributory plan we had in effect.
- Q. And is that what finally happened under your new contract in July?

[324] A. Yes, sir.

- Q. What is the next issue you have on your chart?
- A. The next issue has to do with the mechanics of our upgrading, transferring and layoff, or the operation of our seniority system, the movement of employees.
- Q. Is this what is sometimes called "musical chairs"?
- A. Yes. And this embraces the sections of the contract 11 through 16.
- Q. Now, will you tell us the status of this issue on March 31st? Let say at the beginning of the meeting on March 31st?
- A. Throughout negotiations, from the very beginning, the company had done everything possible to impress the union with the seriousness of this problem, and what it was doing to our operations, and how difficult it was making it for the company to compete in a very highly competitive field, and that while this system originally had been agreed to when we had relatively simple products, without a great variety or difference between products, it had now become an unbearable—

Mr. Davidson: I now object.

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Mr. Wayman: I believe that's right.

- Q. (By Mr. Wayman) What was the status of this issue at the beginning of the meeting of March 31st? Was the company requesting a change and had the union agreed to it?

A. All right. I—

[325] *Mr. Davidson:* I would like to move to strike the previous portion.

Trial Examiner: It may stand. All witnesses may do that. Your witnesses do it. Give their own opinions and arguments. It may stand.

The Witness: Up until the final hour on March 31st—the contract expiring at midnight—in an effort to avoid a strike the company reluctantly gave up its position on these seniority sections of Section 11 through 16, in the hopes of resolving our differences and coming out with a contract before it was too late.

- Q. (By Mr. Wayman) Was this part of what you might call a package proposal?

A. Yes. The company offered to settle for all of the tentative agreements that had been made up to that point, plus a continuation of all of the other sections of the contract on which no tentative agreement had been reached, provided that both parties would drop any other outstanding issues and we sign a contract and bring our negotiations to a successful conclusion without a strike.

- Q. Did the union accept this proposal?

A. No, they did not.

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- Q. Now, will you tell us what happened after March 31st, first with respect to your position.
- A. With the strike already two weeks old, we met on April [326] the 14th, and the company made a proposal at this meeting involving certain supplements to Sections 11 through 16.
- Q. What was the next move? Were these proposals accepted?
- A. No, they were not.
- Q. What was the next move or change in position on this issue?
- A. As I have already stated, on April 21st we added a paragraph to Section 16 in an effort to resolve the issues on Section 6. This was successful, and did result in a tentative agreement on Section 16, which left 11 through 15, then in this group.
- Q. When did you finally reach an agreement, if you did, on Sections 11 through 15?
- A. As has already been stated by Mr. Colella in his testimony, we reached agreement on Sections 12, 13, 14 and 15 on June the 4th, and agreement on Section 11 on the following day, June the 5th.
- Q. Now, were the agreements thus arrived at the provisions as they appear in the contract of July 17, 1959?
- A. Yes, they are.
- Q. What is the next issue you have on your chart?
- A. The next issue is not a contractual issue, but as a result of the discharge of some employees because of picketline conduct. This issue got on the table in our meeting of April the 21st, and involved two employees, Val Skiba and [327] Elmer Buren.

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- Q. As briefly as you can, tell us what happened in regard to this issue. In other words, just continue your tale on through until the end.
- A. At this meeting of the 21st the union was proposing that these people be reinstated, and on May 5th, in connection with another or a package proposal that the company made, we offered to reinstate Skiba and Buren, but there was no agreement on the package, so the issue was not settled.
- Q. What's the next event that occurred regarding the discharged employees?
- A. The next thing that occurred when we met on May the 11th, we had had two other incidents involving discharges of employees—and now we had a total of four—in addition to Skiba and Buren. Karpinski and Grafius.
- Q. When did these incidents occur, if you know?
- A. These incidents occurred in connection with a mass picketing that occurred at the plant on May 7th and 8th.
- Q. These two new discharges you say were in connection with that event?
- A. Yes, sir.
- Q. What happened at the meeting of May the 11th? What happened regarding the dischargees?
- A. The union of course was also demanding reinstatement of all four dischargees now.
- [328] Q. Did you agree?
- A. No, sir.
- Q. What was the next move or proposal regarding the dischargees?
- A. The next thing that occurred, that we found out about on May the 13th, was that the union had filed

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charges against the company, in connection with each of these discharges, with the National Labor Relations Board.

Q. Was there any proposal or move in that meeting to dispose of this issue?

A. No, sir.

Q. What was the next move or proposal regarding this issue?

A. The next movement involving this issue, I find I have a notation of, was on June 3rd. At this time the union proposed that the company arbitrate this issue of the four discharges. We reminded the union that they had filed charges with the NLRB, and that they had a remedy; and had chosen this avenue to resolve the issue, and that we would abide by the outcome of it.

Q. What was the disposition of these charges that were filed with the NLRB?

A. The charges were all dismissed.

Q. What was the next move or proposal with regard to these discharged employees?

A. Well, we had another occurrence involved, I believe, on [329] June the 11th. We had a fifth individual by the name of Gilson, who was discharged, and now we had a total of five.

Q. Were any proposals or moves made at that meeting?

A. No, not at that meeting.

Q. When was the next proposal or move on this?

A. At the next meeting, June the 12th, the company proposed reinstating Karpinski and Skiba, with a ninety-day disciplinary layoff.

Q. What did it say with respect to the other three?

A. We were not willing to reinstate them.

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- Q. Did the union agree to this?
- A. No, sir.
- Q. What was the next move or change in position with respect to this issue?
- A. The next move was immediately following the abandonment of the strike. In our meeting on July 7th we proposed that Skiba and Karpinski be reinstated with a thirty-day disciplinary layoff.
- Q. And what was to happen to the other three?
- A. The other three were to be considered as discharged, and no further discussion.
- Q. Did the union accept this proposal?
- A. This was finally agreed to in our settlement agreement, strike settlement agreement, on July 17th..
- Q. What is the next issue that you have on your chart?
- [330] A. The next issue has to do with replacements. This arose for the first time in our meeting of May the 11th. We told the union at this meeting that with the hiring of replacements that we would have a problem on which we were going to have to find some kind of solution, probably in the area of some kind of super-seniority, which would assure these people work after the strike was over.
- Q. What did the union say to that?
- A. The union took the position that super-seniority was a discriminatory and illegal request, and they didn't want to have any part of it.
- Q. What was the next move or change in position by either party on this issue?
- A. The next thing of any change was on May 28th, at which time we explained to the union that it looked like this super-seniority was going to have to be a figure in the neighborhood of twenty years, and that,

based on our reductions of our sales and our work force, it appeared that this was what was going to be necessary to carry out our job assurances, our promises to these replacements that were hired.

- Q. What did the union say to that?
- A. They continued to maintain the same position.
- Q. They would not agree?
- A. They would not agree.
- Q. When was the next move or change in position on this [331] issue?
- A. On June the 2nd, the union suggested that if we could resolve the strike or resolve our issues and settle the strike and get people to come back to work that we have a thirty-day grace period in which to lay off or work out the turn-over of replacements that we had hired.
- Q. In other words, dispose of the replacements?
- A. Dispose of the replacements.
- Q. Did you agree to this?
- A. No, we did not.
- Q. When was the next move or change in position or proposal on this issue?
- A. The next move that I have noted was on June the 3rd. And which the—I believe the union told us they were filing a charge with the National Labor Relations Board in connection with our replacement policy.
- Q. They made no proposal at this meeting, as I understand?
- A. That is correct.
- Q. What happened next with regard to this issue?
- A. In our meeting of June the 11th the company proposed that instead of twenty years super-seniority

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that perhaps we could work out something on the basis of having seniority equal to the most senior person in the department in which the employee happened to find himself.

Q. Did the union agree to this proposal?

[332] A. No, they did not.

Q. What happened next?

A. At the next meeting on June 12th it was suggested that perhaps the same kind of super-seniority that had always been accorded to union officers and stewards might be applied to these replacements. In other words, that they be the last to be laid off.

Q. Did the union agree to this proposal?

A. No, they did not.

Q. What happened on June 15th, if anything, in this regard?

A. June the 15th was an off-the-record meeting, and I have no notes on it.

Q. What happened next with respect to this issue?

A. The next was a company proposal, again an effort to seek an agreeable solution to this thing. We offered to consider these replacements as red-circle employees.

Q. Was there any agreement on this proposal?

A. There was no agreement on it.

Q. What happened next?

A. June the 24th there was some further discussion about the disposition of this issue through the National Labor Relations Board and the Courts.

Q. Was there any agreement on this proposition?

A. Not on that day, no, sir.

Q. What happened next?

[333] A. At our meeting on July 7th the union proposed dropping their National Labor Relations

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Board charge if the company—between a period of thirty and sixty days—would agree to let the replacements go and bring other people back to work.

- Q. Did the company agree on this?
- A. No, sir.
- Q. What happened next?
- A. This issue was finally disposed of in the strike settlement agreement between the company and the union, in which we left this issue to be decided by the NLRB and the Courts.
- Q. If I am not mistaken, in response to a subpoena from Mr. Fleischut you produced that strike settlement agreement, and it is in evidence as General Counsel's Exhibit 27. Would you just look at General Counsel's Exhibit 27, please, and confirm that?
- A. Yes, this is the document.
- Q. Will you read for us the portion of that agreement which disposes of this issue?

Mr. Fleischut: I object to that. It's in evidence.

Mr. Wayman: I think we ought to refer to it. We have referred to part of this agreement. It is in evidence, is that true?

Trial Examiner: Oh, yes, it is in evidence, but go ahead. I'll overrule your objection.

The Witness: "The company's replacement and job assurance [334] Policy to be resolved by the NLRB and the Federal Courts, and to remain in effect pending final disposition."

- Q. (*By Mr. Wayman*) Thank you. What is the next issue that you have on your chart?
- A. The next issue is Union Shop, or Section 2 of the contract.

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- Q. When did this become an issue?
- A. This became an issue on May 14th.
- Q. What did you tell the union, in words, as near as you can remember, at this meeting on May 14th regarding this item?
- A. The company withdrew its former tentative agreement on Section 2, the reason for this being—
- Q. Did you tell the union why?
- A. Yes.
- Q. Will you tell us what you told them?
- A. Yes. The reason being the threats of fines and dues and so on which the union had made upon employees, and the fact that replacements had come to work and were being subject to abuse on the picket line and harassment at home, and that we felt these people should not be required to work under a contract providing for a union shop whereby they would be forced to belong to the union as a condition of employment.
- Q. Was there any agreement on this issue that day?
- A. No, sir.
- [335] Q. What next happened with respect to this issue?
- A. The company made a proposal on May 22nd that we would agree to a maintenance-of-membership provision.
- Q. Was there any agreement on that?
- A. No agreement was reached on that date, no, sir.
- Q. Tell us how the maintenance-of-membership provision differed from the union-shop provision.
- A. Yes.
- Q. In your proposal.
- A. Under a maintenance-of-membership an employee is free to join the union or not to join, as he chooses.

Once he does join, however, he is required to continue to pay his dues for the duration of the contract and to remain a member in good standing.

- Q. Was this different than the provision in your previous contract?
- A. Yes, sir. The union-shop provision in the previous contract provided that all employees must be members of the union after a thirty-day probationary period, and remain members in good standing in order to continue as employees.
- Q. What next happened with respect to this issue?
- A. There was no further change in position on this issue, and it was finally resolved by agreement on maintenance-of-membership. I have the final agreement on July 15th.
- Q. And was it finally incorporated in the contract of July [336] 17th?
- A. Yes, it was.
- Q. What is the next issue you have on your chart?
- A. The next issue has to do with check-off of union dues under Section 3 of the contract.
- Q. Will you tell us when that first became an issue?
- A. This became an issue on May 14th, and was withdrawn—our former tentative agreement was withdrawn—at the same time that the tentative agreement on union-shop was withdrawn.
- Q. Did you discuss these two issues together?
- A. Yes, we did.
- Q. Will you tell us what next occurred with respect to this issue?
- A. Yes. The only change that the company proposed in this section was that the escape period be provided thirty days after the signing of the contract instead

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of thirty days before the expiration of the contract, as it was in the current agreement.

- Q. Was there any agreement on this proposal?
- A. Yes. We agreed on this change on June the 4th.
- Q. Is that what finally appeared in the contract of July 17th?
- A. Yes.
- Q. What is the next issue you have on your chart?
- A. The next issue has to do with the seniority of union [337] officers, section 18.
- Q. When did this become a union offer?
- A. On May 14th.
- Q. On May 14th. Did you tell the union why you withdrew the tentative agreement?
- A. Yes.
- Q. What did you say?
- A. We said this was being withdrawn because of the I believe the words were "the irresponsibility of the union officers and their conduct in control of the strike.
- Q. Were there any proposals or movements on this issue subsequently?
- A. We made a proposal on June 2nd that this section be continued in the contract with some limitation on the number of officers, and suggested eight top officers of the Local.
- Q. Was there any agreement on this?
- A. No, this was not agreed to.
- Q. What next happened with respect to this issue?
- A. Two meetings later, on June 4th, we did revise this section to enumerate the eleven top officers of the Local, and this was agreed to.

- Q. And is this what finally appeared in the contract of July 17th?
- A. Yes.
- Q. What is the next issue you have on your chart?
- [338] A. The next issue has to do with seniority of union stewards, or Section 19.
- Q. When did that first become an issue?
- A. Also on May 14th.
- Q. Was this at the same time?
- A. Same time as the other three, Sections 2, 3 and 18.
- Q. Will you tell us what happened with regard to this issue, please?
- A. The proposal was made on May 22nd that union stewards have no super-seniority.
- Q. Was there any agreement on this?
- A. No, sir.
- Q. What next happened?
- A. This issue was resolved, without any further complications, on June the 4th. At that time we agreed to continue the provisions of Section 19 as they had been in the contract.
- Q. Is that what appeared in the contract of July 17th?
- A. Yes.
- Q. In other words, the same as the prior contract?
- A. Yes.
- Q. Have you any more issues on your chart?
- A. No, sir.
- Q. Does this fairly state the issues that were discussed between you and the union during the strike and after the strike, up until the contract was signed?

[339] *Mr. Fleischut:* I object to that.

Trial Examiner: I hope it does.

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The Witness: In condensed form, yes.

Trial Examiner: This is just sort of a summary, and I thought that was stated even at the beginning of his testimony.

Mr. Wayman: That is correct.

Trial Examiner: You may answer.

The Witness: This certainly is an abbreviation, and not a complete history of everything that happened. These are the significant things that happened, as I saw them.

Trial Examiner: Are you going to start a new line of questioning?

Mr. Wayman: Yes.

Trial Examiner: I think we had better take about a ten-minute break here.

(Recess.)

Trial Examiner: All right, the hearing will be in order. Go ahead, Mr. Wayman.

Q. (By Mr. Wayman) Mr. Ferrell, in your capacity as Director of Industrial Relations, did you become aware of a company policy to employ replacements?

A. Yes, sir.

Q. When did you first become aware of that policy? As nearly as you can come?

[340] A. A day or two prior to the letter the company issued on May 3rd.

Mr. Wayman: I will ask this document be marked Respondent's Exhibit 6.

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(Thereupon, the document above referred to was marked Respondent's Exhibit No. 6 for identification.)

Trial Examiner: Just for the record, the letter you referred to—or the witness referred to—as May 3rd, that's General Counsel's Exhibit Number 7?

Mr. Wayman: I believe it is, sir, but we will check it.

Mr. Murphy: Yes.

Mr. Wayman: That is correct.

- Q. (By Mr. Wayman) Mr. Ferrell, I show you a clipping from a newspaper which has been marked for identification as Respondent's Exhibit 6, and ask you what it is, if you recognize it.
- A. An article that appeared in the Erie Times on Monday, May the 4th.
- Q. So we can identify it in the record, will you just read the heading, the headline?
- A. Yes. The headline states "Resistor plants to start hiring".
- Q. Did this article, to your knowledge, appear in that paper on that day?
- A. Yes, it did.
- Q. And I think we have established the Erie Times is a Newspaper of General circulation in the Erie area?

Trial Examiner: Yes, that is already established in the record.

Mr. Wayman: I offer Respondent's Exhibit Number 6.

Mr. Fleischut: No objections.

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Trial Examiner: Any objection?

Mr. Fleischut: No.

Trial Examiner: The newspaper clipping may be received in evidence and marked Respondent's Exhibit Number 6.

(The document heretofore marked Respondent's Exhibit No. 6 for identification was received in evidence.)

Mr. Wayman: I will ask this newspaper clipping be marked Respondent's Exhibit 7.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 7 for identification.)

Mr. Fleischut: What is the purpose of offering this exhibit?

Mr. Wayman: The purpose of offering this exhibit is to show the people in the Erie area knew what was going on at the Resistor plant, and it necessarily would have an effect on anybody that intended to go to work there.

Mr. Davidson: I take it you are not offering it to [342] establish the contents as stated in it? You are offering it to establish this was in the newspaper?

Mr. Wayman: This was in the newspaper of general circulation in this area, and it is a fair inference that people read it, since it was on the first page on that date.

Mr. Fleischut: And not as to the proof of the truth of the material therein contained?

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Mr. Wayman: We will prove that by witnesses if it becomes necessary. This is offered to show what did appear in the newspaper and what people in the area read.

Q. (*By Mr. Wayman*) I'm going to show you this clipping from a newspaper, which has been marked for identification as Respondent's Exhibit 7, Mr. Ferrell, and ask you whether or not to your knowledge that appeared in the Erie Daily Times and on what day.

A. Yes, this article appeared on the front page of the Erie Daily Times on May 7, 1959.

Q. And, for the purpose of identifying it, will you just read the headline, the streamer headline?

A. Yes.

Mr. Davidson: I object to it. If it's going in evidence it will be identified.

Trial Examiner: He may read the headline. I don't see that it is too long.

The Witness: The headline states "Act to Reopen Resistor [343] Plant. Closed to Avert Violence."

Mr. Wayman: I will offer respondent's Exhibit 7.

Mr. Davidson: I say there may be an awful lot of things in the Erie area that the people may be aware of from the daily press, but I don't think certainly the fact this was in the press is relevant to what the company is doing on these dates. At least at this point I don't see it. If it becomes relevant later on, that would be the appropriate time to raise it.

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Mr. Wayman: One of the questions is whether or not it is reasonably necessary in these cases, as I understand it, to give some assurance to people that they will be continued on the jobs that they take, when they cross a picket line, after the strike is over.

One of the matters considered by the Courts in this connection is the existence of violence, the atmosphere in the community, and the concern of these people, their apprehension lest they suffer some loss by crossing the picket line.

Trial Examiner: Are these simply newspaper reports of the situation, as distinguished from quoting company officials?

Mr. Wayman: That is correct, sir.

Trial Examiner: They are just newspaper accounts?

Mr. Wayman: That's correct.

Trial Examiner: I don't think they are too material, myself. I don't know what they might prove. I will accept in evidence Respondent's Exhibit Number 7, but if you had in [344] mind putting in any series of these newspaper items, then I am not going to take that. I thought perhaps the one of May 4th, Respondent's Exhibit 6, may have had some bearing, that the plant was going to reopen.

Mr. Wayman: That does—that does quote the company.

Mr. Fleischut: That's number 6, which quotes a company official. As to that, we have no objection. But as to the other, I register an objection.

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Mr. Wayman: I have one other similar to Number 7.

Mr. Fleischut: The objection is on the same basis as Number 7.

Mr. Wayman: I haven't offered this. It isn't even marked.

Trial Examiner: Anticipatory. I will receive Number 7.

(The document heretofore marked Respondent's Exhibit No. 7 for identification was received in evidence.)

Mr. Fleischut: Are you offering the material on the reverse side?

Mr. Wayman: Not unless it's a continuation.

Mr. Davidson: I would certainly object to putting in a part of the document.

Mr. Wayman: May I see it, please?

Mr. Davidson: The same objection applies to this as to the other one. Is this the last one of these?

Mr. Wayman: That's the last one of these, yes.

Mr. Fleischut: Let the record indicate the objection to Exhibit 8, as well as 7.

Mr. Wayman: I think we ought to have it marked first.

Trial Examiner: Yes, get it marked.

Mr. Wayman: Will the reporter please mark this newspaper article as Respondent's Exhibit Number 8.

Gordon D. Ferrell—Direct.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 8 for identification.)

Mr. Wayman: I think the record should show I have shown this already to the General Counsel and counsel for the charging party.

- Q. (By Mr. Wayman) Now, I will ask you, Mr. Ferrell, to look at Respondent's Exhibit 8 for identification, and tell us what that is.
- A. Part of the front page of the Erie Daily Times for May 8, 1959.
- Q. To your knowledge did that article appear in that paper on that day?
- A. Yes, it did.

Mr. Wayman: I will offer respondent's Exhibit 8.

Mr. Fleischut: The admission is objected to.

Trial Examiner: I understand it is objected to, but, since I have received the prior clipping in evidence, I will receive [346] this, number 8 in evidence. I question the materiality of it.

(The document heretofore marked Respondent's Exhibit No. 8 for identification was received in evidence.)

Mr. Wayman: I am going to ask that this newspaper advertisement be marked Respondent's Exhibit 9.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 9 for identification.)

Gordon D. Ferrell—Direct.

- Q. (*By Mr. Wayman*) Mr. Ferrell, I show you a newspaper advertisement which is marked for identification as Respondent's Exhibit 9, and ask you what that is.
- A. This is a paid ad which appeared in the Morning News on Wednesday, May 13, 1959. It is an open letter to the citizens of the Erie community. It is an ad that was written and paid for by the then-working employees of Erie Resistor.

Mr. Wayman: I will offer Respondent's Exhibit 9.

Mr. Fleischut: This—

Mr. Davidson: The same objection. I think we are beginning to pad the record with a lot of irrelevant and inflammatory records. It doesn't prove the truth of the context. This is dated after the date, as far as I am aware, the company made its decision, and I see no relevance or materiality at all.

Mr. Wayman: Of course, the violence and terrorism business stopped on May 11th.

Mr. Fleischut: I object to counsel testifying.

[347] *Mr. Wayman:* We will put in our evidence on that, as I indicated. We have to do it in some order, and we can't do it simultaneously. I said I would put in evidence on violence and the violation of the law of Pennsylvania last because we have to give it some order. We could save this for that point, but I think if this witness has personal knowledge of it he can testify to that.

Trial Examiner: This was paid for by the employees?

Gordon D. Ferrell—Direct.

Mr. Wayman: Mr. Ferrell, do you know?

The Witness: Yes, sir.

Trial Examiner: All right, I will receive it in evidence.

Mr. Fleischut: Note an objection, please.

Trial Examiner: Yes, you both have an objection.

(The document heretofore marked Respondent's Exhibit No. 9 for identification was received in evidence.)

Mr. Wayman: I am going to ask this document be marked for identification as Respondent's Exhibit Number 10.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 10 for identification.)

Q. (By Mr. Wayman) Mr. Ferrell, I show you a document marked for identification as Respondent's Exhibit Number 10 and ask you what that is.

[348] A. That is a letter dated May 13, 1959, that was mailed to all interested individuals who had contacted the company expressing a desire to return to work.

Q. Who signed this letter?

A. I did.

Mr. Wayman: I will offer respondent's Exhibit 10 in evidence.

Mr. Davidson: Again I object. This is a completely self-serving document, no indication as to

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what prompted this thing. It makes a number of negative statements, some affirmative and some negative. This is what the company sent to the employees. I don't see what this proves.

Mr. Fleischut: It has no probative value.

Trial Examiner: It was sent to all interested individuals. What was the rest of that description?

Mr. Wayman: Who expressed a desire to return to work. One of the important points, for example, it says "The company guarantees you will not be discharged because of returning to work at this time."

Now, one of the questions is what did we tell these people when they came in, and this is what we told them.

Mr. Fleischut: There is a pencilled notation at the top. Is that meant to be a part of the exhibit?

Mr. Wayman: No, it is not.

Mr. Fleischut: That may be disregarded?

[349] *Mr. Wayman:* Yes.

Trial Examiner: Are you offering that in evidence?

Mr. Wayman: Yes, I am.

Trial Examiner: I will overrule the objection and receive the letter in evidence as Respondent's Exhibit Number 10.

Mr. Fleischut: You noted General Counsel's Exhibit Number 10?

Gordon D. Ferrell—Direct.

Trial Examiner: Yes.

(The document heretofore marked Respondent's Exhibit No. 10 for identification was received in evidence.)

- Q. (By Mr. Wayman) Mr. Ferrell, will you tell us whether or not this letter was also posted on the bulletin boards within the plant?
- A. Yes, this was posted on the bulletin boards within the plant for the information of the employees working in the plant.

Mr. Wayman: I am going to ask that this four-page document be marked Respondent's Exhibit 11.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 11 for identification.)

- Q. (By Mr. Wayman) Mr. Ferrell, I show you a document consisting of four pages which has been marked for identification Respondent's Exhibit 11, and ask you what that is.

A. This is a union proposal dated May 22, 1959, entitled [350] "Strike Settlement Agreement", and was written as a union proposal for resolving the open issues at that time.

- Q. Was this presented to you in negotiations?

A. Yes, it was.

Mr. Wayman: I offer respondent's exhibit 11.

Mr. Fleischut: I'd like to ask several questions concerning this document, if I may.

Mr. Wayman: Without the pencilled notations.

Mr. Fleischut: On all of the four pages?

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Mr. Wayman: On all of the four pages.

Trial Examiner: Do you want to conduct a voir dire examination on this?

Mr. Fleischut: I have no objection, having ascertained that.

Trial Examiner: All right, the proposal may be received in evidence, marked as Respondent's Exhibit Number 11.

(The document heretofore marked Respondent's Exhibit No. 11 for identification was received in evidence.)

- Q. (By Mr. Wayman) Mr. Ferrell, did you agree on the proposal made by the union which has been introduced as Respondent's Exhibit 11?
- A. No, we did not.
- Q. Now, Mr. Ferrell, did you at any time in the course of [351] these negotiations following May 3rd tell the union negotiators what the company meant by "replacements"?
- A. We told the union that, as far as the company was concerned, that replaced employees were considered as having been terminated and no longer enjoyed the status of an employee of the company.

Mr. Wayman: I have no further questions on direct.

Trial Examiner: Let me ask you this. After you told the union this, and as men were replaced, did you send out any notice of any kind to the strikers who had been replaced?

The Witness: Telling them that they had been—

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Trial Examiner: Yes. Such as—I don't know what your policy would be, or practice would be. For instance, their insurance had been cancelled, or anything like that?

The Witness: Not during the strike, no, sir.

Trial Examiner: Do you want a few minutes to examine your notes before you start your cross examination?

Mr. Fleischut: It might be helpful, sir.

Trial Examiner: Before that, when was it that you advised the union the replaced employees would be considered as terminated?

The Witness: Any time they asked the question.

Trial Examiner: That was your position throughout the negotiations?

The Witness: Yes.

[352] *Trial Examiner:* Once it was raised, say, around May 11th or 14th?

The Witness: Yes.

Trial Examiner: We will take a five or ten-minute break so he can check his notes.

(Recess.)

Trial Examiner: The hearing will be in order. Go ahead, Mr. Fleischut.

CROSS EXAMINATION

- Q. (*By Mr. Fleischut*) Mr. Ferrell, the very long and informative discourse you gave on the progress of negotiations, were you reciting that information from memory, on the progress of each contract section?
- A. Yes.
- Q. You were referring to papers, weren't you?
- A. I was referring to some notes I had on my chart, yes.
- Q. When did you prepare that chart?
- A. When?
- Q. Yes.
- A. Oh, several days ago, within the last week.
- Q. For the purpose of testifying at this hearing?
- A. Yes.
- Q. Do you recall a time in negotiations when the union offered to give up its demand for continued union security shop if the company would arbitrate or drop the super-seniority [353] plan?
- A. Do you have a particular meeting that you are referring to?
- Q. I am referring to page 14 of your affidavit. Page 14, with reference to on June 11th and June 2nd there was bargaining on the replacement system.
- A. June 2nd?
- Q. Well, I will read the statement to you. "On June 11th the union, as it had on June 2nd, further bargained with the company concerning the replacement system. It offered to give up its demand for the union shop if the company would either arbitrate or drop

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the so-called twenty-year seniority plan." Do you recall making that statement?

A. Yes.

Q. And do you recall at that same meeting the union informing you that both the local and international would continue the strike until the company yielded on super-seniority?

A. Yes, this was the meeting of June 11th, is that not correct?

Q. Yes.

A. Yes.

Q. You also testified concerning the events at the close of the strike, concerning the negotiations at that time? I direct your attention to the 24th and the 25th of June, 1959. Looking at your chart, at that time?

[354] A. Yes.

Q. Do you recall stating in your affidavit, and I quote, "And this occurred after the first telegram had been delivered. I called Mr. Colella and told him that we were happy that the strike had been called off, and told him we would like to know what arrangements was referred to—"

Mr. Wayman: Excuse me. That's a misquote.

Q. (By Mr. Fleischut) "The agreement referred to in the telegram"—"and told him we felt the only agreement in existence was the agreement the company turn over to the union a list of those who had been replaced. I told Mr. Colella we had agreed to that and would do so. I was particularly concerned to have the agreement referred to in the telegram spelled out since it was my understanding that no

agreement had been reached on the 24th. Mr. Colella's confirmation of my understanding was made without reservation. I pointed out to Mr. Colella the employees would be coming back to work without a contract, and he agreed." Is that correct?

- A. Yes; exactly.
- Q. When you talk about employees coming back to work without an agreement you don't mean those who were replaced, do you?
- A. No, I meant those employees who still had employee status.
- Q. Do you recall a time in negotiations when Mr. Colella said the company was willing to go back to work, but to continue to discuss the remaining issues?

[355] *Trial Examiner:* You mean the union?

Mr. Fleischut: The union was willing to go back to work and discuss the remaining issues.

- Q. (*By Mr. Fleischut*) I refer to June 5th. I am not referring to the affidavit at this time.
- A. June 5th?
- Q. Yes, sir.
- A. The only notes I have on June 5th would be we discussed Section 11 and Section 2, and that no further proposals were made as far as being able to resolve the open issues at that time, so we recessed the meeting at noon.
- Q. I believe you testified that at least on one occasion Mr. Colella proposed that the employees go back to work but the various remaining issues be submitted to arbitration or an impartial panel, is that correct?
- A. On what date was that?

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- Q. I want you to call upon your general memory. I'm not referring to any particular date. Do you recall him stating that?
- A. I have to make a qualified answer.
- Q. Please do.
- A. There certainly were proposals by the union to resolve these issues through arbitration or through mediation. The only part that I'm not clear on is whether or not the employees were to return to work in the interim. This I can't recall [356] clearly, and I don't want to state one way or the other.
- Q. Now, you developed the course of negotiations concerning the five discharged employees?
- A. Yes.
- Q. And I believe that two of these were not criminally charged, is that correct? Please refer to your notes there.
- A. I have no indication who was criminally charged or otherwise. All I know is all five were discharged.
- Q. You remember, do you not, that not all of them were criminally charged?
- A. Well, let me think here. I really don't know because I did not partake in pressing any criminal charges.
- Q. Do you recall a time early in the negotiations when it was your position that discharged employees who were not criminally charged would be returned to work at the conclusion of the strike?
- A. Yes, we said any of the discharged employees who were not found by a Court of Law or by the NLRB would be reinstated, yes, that was our position.
- Q. That was not the question I asked you. The question was those who were not arrested, was it not the

company's position early in negotiations that they would be returned to work at the end of the strike?

- A. I am trying to sort this out. Do you want to state the question again? It is not clear to me.

[357] (Last question read.)

The Witness: We said those who were not found guilty by a Court of Law, we were willing to reinstate them.

- Q. (*By Mr. Fleischut*) Those who were not found—
A. Those who were not found guilty by a Court of Law; we would be willing to reinstate them. This was the position, as I recall.
Q. Then at a later time did you not additionally insist that the employees be reinstated, according to the direction of the NLRB, as a condition to their employment?
A. We were willing to abide by the disposition of the case by the NLRB, yes. I remember the four charges had been made in connection with the discharges, and we said we would abide by the decision of the NLRB, yes.
Q. This was not an original requirement of your condition for reinstating these employees, was it?
A. This was not an original requirement, that is correct.
Q. When did it become a requirement?
A. Only after the charges had been filed
Q. What date does your charge indicate that you made such a change?
A. The earliest note that I have concerning the NLRB charges is on May 13th.

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Q. Are you aware that two of the NLRB charges were filed on April 16th and 17th, respectively?

[358] A. I am sure I was, because the company received copies of the charges.

Q. And it was not until approximately a month later that the NLRB clearance was made a requirement for their reinstatement, is that correct?

Mr. Wayman: That's objected to in the form in which it is put. I think the witness said he indicated that the company would be willing to abide by the disposition of the NLRB, sir.

Trial Examiner: Well, this is cross examination. He may answer. Overruled.

The Witness: Do you want to ask the question again?

Q. (By Mr. Fleischut) Wasn't it over a month after the charges were filed that you made NLRB clearance a condition for reinstatement of the two employees who filed charges with the NLRB respectively on April 16th and 17th?

A. That is approximately a month. It is not over a month.

Q. Now, directing your attention to the company's position throughout negotiations, on Sections 11 through 15 of the contract, they dealt with the same general subject, did they not?

A. Yes, sir.

Q. What is that subject?

A. The subject was the movement of employees through transfer, job bidding or reduction of force, layoff or recall from [359] layoff.

- Q. Did the company not offer to let these contract sections stand as in the previous contract on March 31st?
- A. In an effort to try and reach an agreement on that date, we certainly did.
- Q. And the next negotiating session was held on April 8th, is that correct?
- A. That is correct.
- Q. And you were asked specifically by the union on that occasion if you were withdrawing that offer, is that correct?
- A. I believe that is correct.
- Q. And on the 14th you proposed some new sections of the contract touching upon Sections 11 through 15, is that correct?
- A. That is correct.
- Q. Although you did not at that time request changes in 11 through 15, as such, is that correct?
- A. These proposals I think, as I stated before, on the 14th were in the nature of a supplement to these sections, which would give some of the relief which we were trying to get, yes.
- Q. But that proposal did not incorporate changing 11 through 15 from the old contract, did it? Changing the wording of the sections?
- A. As I recall that particular proposal, it incorporated some additional departments which would be included as frozen [360] departments, the same as departments 11 and 12 had been.
- Q. Had departments 11 and 12 been frozen in the old contract?
- A. No, I guess they had not. I am sorry.

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- Q. Isn't it correct that the proposals of April 14th were in addition to, but by no way called for the rewording of Sections 11 through 15 in the old contract?
- A. Of course if you added to them it certainly would change them. I don't know how to answer that.
- Q. Did the proposal of that day call for physically changing the words in Sections 11 through 15?
- A. You are getting down to such a fine detail I would have to look at the proposal.
- Q. It was by way of a supplement, is that correct?
- A. It was by way of a supplement.
- Q. Now, when was the next time that the company raised a new proposal on Sections 11 through 15?
- A. The next proposal was made on May the 5th.
- Q. Did you submit written proposals on May 5th, with the alteration, Sections 11 through 15?
- A. Whether this was in writing or not, as to your question, I do not have that proposal here.
- Q. The proposal—
- A. I will say it was in writing.
- Q. And it called for wide-spread changes in those sections, did it not?
- [361] A. Yes.
- Q. A complete rewriting of them?
- A. Yes.
- Q. And that was on the day before you were going to commence to hire replacements, is that correct?
- A. No, I would say it was two days before.
- Q. You had written the letter of May 3rd asking everyone who wanted to return to work to come back on May 7th, didn't you?
- A. Prior to May 7th.

- Q. When were they to report? On May 7th?
- A. No later than May 7th, I believe it said.
- Q. And finally agreement was had on Sections 11 through 15 of the contract on June 4th, is that correct?
- A. All except 11, which was finally initialed on the 5th.
- Q. But 11 was originally agreed to on the 4th, wasn't it?
- A. To all intents and purposes it was settled.
- Q. Who reopened it and asked for a change on the following day?
- A. I assume that you are referring to the changes, the pencil changes on the proposal, which were initialed on the 5th.
- Q. Yes, sir.
- A. The company asked for these changes.
- Q. On May 23rd in negotiations, Mr. Ferrell, didn't you say [362] you didn't even know, yourselves, who had been replaced?
- A. As far as the negotiating committee, that is a true statement.
- Q. And on that same date, in a discussion of the impact upon the twenty-year plan, didn't you say that the people replaced would be the junior people who had been working as of March 31st; they then would be on lay-off?
- A. Would you mind reading that again?
- Q. Perhaps if I read a little longer statement you might recall. So that specifically the people who had been replaced—

Mr. Wayman: May I inquire whether you are reading from the affidavit?

Mr. Fleischut: No, sir. I am not.

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Q. (*By Mr. Fleischut*) "So that specifically the people who had been replaced would be under this situation, as of the movement, would be the junior people who had been working as of March 31st.—They then would be on lay-off—rather than take the position that people spotted all over the place seniority-wise would be replaced, and confuse us even more."

A. I don't recognize the statement. I don't know what it means.

Q. Do you deny that during a substantial portion of the negotiations it was your plan to put the replaced people on layoff rather than permanently replace them as the law permits?

[363] A. No, sir. It was never a plan to put them on lay-off. I think if you refer to our letter of May 3rd, we said initially these people would have their jobs only until they were replaced, and after that they would lose their status as employees.

Q. Did you the same day say the replacement had not been on an individual basis?

A. Yes, I did say that. This was in response to a question did we have an individual list of people we were replacing. We said no, we were not replacing individuals. We were replacing the junior people on the job who were needed, and the chips fell where they fell, and there was no list of individuals we were trying to replace, as had been inferred when I was asked the question.

Q. On May 28th was it not the company's position that people who returned to their own jobs would not receive super-seniority?

A. Would not receive super-seniority. It was not that they would not replace anybody.

- Q. You were not going to give them a flat number of years of extra seniority?
- A. I didn't say that.
- Q. Did somebody else for the company say it?
- A. I don't recall that anyone did, because our position was that they—that this twenty-year super-seniority would [364] apply to all those who came to work under the strike conditions, and that an employee who came to work and returned to his own job certainly was not a replacement, did not replace anybody. That's the best of my recollection on that.
- Q. Is it correct that throughout the negotiations you informed the union that no promises had been made to the replacements which were hired, other than that they were not to be laid off immediately at the end of the strike?
- A. I think we said this a little different way. We had given assurance that they would have a job, and they would not be laid off, yes.
- Q. Immediately at the end of the strike?
- A. As a result of the strike settlement—the settlement of the strike.
- Q. And you, of course, are acquainted with what was actually told the replacements, are you not?
- A. I personally never told any replacement anything.
- Q. But you are personally acquainted with what they were told, is that right?

Trial Examiner: How would he be personally acquainted with what someone personally told them? I think the witness has gone about as far as he can go in stating the company policy was thus and so. As far as he was concerned, I assume it was carried out.

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- Q. (By Mr. Fleischut) As far as you know, was company policy [365] carried out?
- A. Yes.
- Q. And that these people were merely assured they would have a job at the end of the strike, is that correct?
- A. They would continue to have a job, would not be laid off or discharged or terminated or let go because of the settlement of the strike.
- Q. And it was company policy they not be told any specific seniority plan, is that right?
- A. We told them that we were negotiating, trying to arrive at a reasonable method of bringing this about.
- Q. Bringing what about?
- A. This job assurance. That we were not insisting on the twenty-year plan. We had to have something. I think I have testified we made three or four other alternate proposals as to how this might be accomplished. We did not know until the final settlement was reached as to what it was going to be. We stated on June 15th it would be the twenty-year we previously had put down in writing on May 28th unless we came up with something just as good or better that would be satisfactory.
- Q. Now, isn't it correct that in your affidavit you said that replacement employees were never told of any such plan, that they were merely assured they would have a job at the end of the strike?
- [366] A. As they were hired they were never told. That is a correct statement. Yes, sir.
- Q. Is it now your position that sometime after they were hired they were informed of the super-seniority plan?

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- A. Certainly; we informed our employees at all times as to what was going on in negotiations.
- Q. And you posted a notice on June 15th, did you not?
- A. We did.
- Q. And when you drew the plan up on May 27th, which was announced to the union on May 28th,—do you recall the plan I am referring to?
- A. Yes, sir.
- Q. That is in evidence as General Counsel's Exhibit 12.
- A. I said yes.
- Q. And were the employees informed of that plan on May 27th or May 28th?
- A. The employees? No, sir. Some management employees were; but not the production, working employees, no.
- Q. You made a special effort to keep that information confidential, is that correct?
- A. Yes, sir. Yes. May I?
- Q. Yes, you may.
- A. You will note, in looking at this, it had "Policy Procedure". The first part of this was a uniform procedure for making replacements, so that we did it in a unified method so [367] that we did not get involved in discrimination, so that each of the product managers, foremen, would handle this thing in their own departments in the same way, and they were informed merely for the purposes of following a uniform procedure.
- Q. The department heads?
- A. Yes. Now, the application of any twenty-year seniority only came into play if there was a reduction in force, to prevent layoff. This never occurred until sometime in October. It was never used until then.

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unless technically you say it was used on July 17th, because there were people on layoff who had seniority which was in excess of those who were hired during the strike, some of those who came back, if it were not for the twenty-year additive; and of course, the reason for it, to carry out our job assurance on these people who came to work, and it enabled us to continue our business during the strike.

Q. But you had said, had you not, that had Erie Resistor desired or determined to break the strike it could have replaced all of the striking employees? You have made such a statement?

A. Yes, sir. I certainly did make such a statement.

Q. And it was true at the time you said it?

A. Yes, it was. Again, we were concerned with saving our business, and not breaking the union.

[368] Q. And did you not state employees who applied for work and were hired, and were hired as replacements, were told they were hired—strike that. Employees who applied for work and were hired as replacements were told, as they were hired, that their jobs would not end as a result of the termination of the strike, but they were not told what type—

Mr. Wayman: Are you reading from the affidavit?

Mr. Fleischut: Yes.

Mr. Wayman: I'm sorry I interrupted you.

Q. (*Mr. Fleischut*) Is that correct?

A. Yes, that is correct.

Q. Was it not company policy, when replacements were hired, that no forms of super-seniority were suggested to them?

A. That is correct. *(A)*

Trial Examiner: He has said that two or three times.

Q. (*By Mr. Fleischut*) And this was company policy?

A. Yes, sir.

Q. Which employees would be adversely affected by the twenty-year seniority plan?

Mr. Wayman: That is objected to as calling for a conclusion that any one of us in the room can draw as well as Mr. Ferrell. *(S)*

Trial Examiner: I think you had better make that a little bit more specific, even though it is on cross examination.

Q. (*By Mr. Fleischut*) Is it not correct, Mr. Ferrell, every [369] employee with less than twenty years would be adversely affected with the super-seniority plan, either in dollars and cents or in relative position for layoff, or both?

A. Yes. This is true, with certain exceptions, the exceptions being individuals who either because of a specific skill had a job in which someone with less seniority could not replace them and so they were secure in that skill, or where of course, someone in less seniority was a union officer or steward who had super-seniority and would not be affected.

Q. But is it not a fact that if an employee had, for example, twenty-one years of seniority, and he were competing for a job with an employee who had ten

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years of actual seniority and twenty years of super-seniority, that our first employee would be adversely affected?

Mr. Wayman: Under what circumstances?

Trial Examiner: See if the witness understands the question.

The Witness: I lost you on the turn there. The first one had twenty?

Q. (By Mr. Fleischut) Twenty-one years of seniority, and the second employee has ten years of actual seniority, plus "ten"-year super-seniority. They are both in the same job category.

A. Yes.

Q. For economic reasons you have to lay one of them off. [370] Which one is laid off?

A. These were the only two employees left?

Q. That's right. In this job category. And you are going to reduce it to one.

A. This is an extreme example.

Q. Yes.

Trial Examiner: Let's don't paint too black a picture. Just go ahead and answer the question. If it boiled down to ten men?

The Witness: The one with super-seniority would stay.

Q. (By Mr. Fleischut) Then employees with more than twenty years of actual seniority can be adversely affected by super-seniority, is that correct, in such a situation?

A. No, sir. That's a different question.

Q. I just gave you the same situation.

Mr. Wayman: I suggest you don't repeat that.

Trial Examiner: That's what you always get when you ask the extra question and try to wrap it up. It was my understanding the general picture, apart from specialists, the twenty years super-seniority would certainly favor the men who obtained it. Is there any argument about that? In the case of a layoff?

Mr. Wayman: There is no question about that in the case of a layoff. As it says, it did not apply to job bidding and these other things, but as to lay-off there is no question.

[371] Q. (*By Mr. Fleischut*) As to layoff, it would affect everyone, even those with more than twenty years of actual seniority?

- A. If it came down to between those two people only.
- Q. And in similar situations?
- A. No, sir, because you could have an individual with twenty-one or twenty-two years of regular seniority whose job would not be affected by any of these people, because they could not bump them, they could not bid them, and it could only occur in the case of a layoff, and if these were the only two left, and this is no different than would occur with a union officer or steward.
- Q. It could occur if there were three employees in the job category and another one had fifty years seniority? Would the same result occur?
- A. If one had fifty?
- Q. One has fifty years seniority and one had ten years of real seniority and "ten" years of super—and

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twenty years of super-seniority, and the man I am interested in has twenty-one years of actual seniority. Now, who is laid off?

- A. The one with the most total seniority stays.
- Q. And the one with the least total seniority goes?
- A. Is out.
- Q. Super-seniority being a factor?
- A. Unless he is a steward or officer with super-super seniority, [372] and had twenty-one years, then the officer or steward would stay.
- Q. The super-seniority policy has been the effective factor in layoffs and recalls since the strike?
- A. It certainly has had an effect, yes.
- Q. It has been the effective factor?

Mr. Wayman: This is objected to.

Mr. Fleischut: The efficient cause.

Trial Examiner: Let him finish his question.

- Q. (By Mr. Fleischut) Isn't it correct super-seniority has been the efficient cause in layoffs and recalls and terminations since the strike?

Mr. Wayman: Layoffs or recalls generally is due to lack of work or additional work.

Mr. Fleischut: In the selection—

Trial Examiner: Are you withdrawing that question?

Mr. Fleischut: Yes.

- Q. (By Mr. Fleischut) Is it correct that super-seniority has been the efficient cause in the selection of employees for layoff and recall since the strike?

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Mr. Wayman: That's the same.

Trial Examiner: Yes, that's the same question, as far as I see it. What do you mean by the efficient cause?

Mr. Fleischut: The moving factor.

Trial Examiner: Why don't you start over again? I don't [373] follow you on "efficient cause".

The Witness: I don't either.

Q. (By Mr. Fleischut) Has super-seniority been taken into consideration in all the layoffs and recalls since the termination of the strike?

A. If the individual being reduced had twenty years super-seniority it was taken into account in the event of layoff only.

Q. And someone else without it would go instead, is that correct?

A. This could happen.

Q. Isn't that what did happen?

A. In some cases, yes. In all cases, no.

Mr. Fleischut: No further questions.

Trial Examiner: Do you have any questions, Mr. Davidson?

Mr. Davidson: Yes, I do have some. I will try to avoid covering the same ground as Mr. Fleischut.

Trial Examiner: That will be very much appreciated.

Mr. Davidson: I thought it would.

Q. (By Mr. Davidson) Mr. Ferrell, turning your attention to your summary of the wage issue which

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existed as of March 31st, the strike commenced, and I would appreciate a little clarification. You state that on May 6th the union proposed arbitration of the wage issue. Would you tell us in detail—a little more detail—what they proposed to arbitrate?

[374] A. On May 6th?

Q. That's right. Perhaps I can help you. Was the proposal for arbitration of wages to take effect as of the termination of the strike or was the proposal for arbitration in six months in the event the parties were unable to reach an agreement at the time of the reopeners?

A. I think you will have to start back on this meeting with a package proposal in which the company offered a wage reopeners between November 1, 1959 and November 15, 1959, and if no agreement was reached with respect to wages the union may not strike nor will this wage issue be subject to arbitration and this agreement shall continue in full force and effect until midnight March 31, 1960. And then there were additional items in this package offer.

In reply to the company's package offer Mr. Bordonaro stated that we had reached agreement on Section 8 as had been proposed by the company, that the union would ask the company to pay the full cost of insurance in lieu of a wage increase, and that they could not agree on freezing of new departments, or to submit these issues to arbitration for solution. That is the only reference to wages and arbitration that I have on that day.

Q. Is this from a written proposal?

A. No, no. This is a typewritten sheet from my handwritten copy. It is just easier to read.

Q. Those are your notes?

[375] A. Yes.

Q. With respect to the proposal made by the company under Section 48, that there would be two weeks vacation after three years of service, is it correct that this proposal would not have had impact on any employee employed at the time the strike commenced on March 31st?

A. Because of the large layoff list, that is a true statement.

Q. Mr. Ferrell, with respect to the issue of the reinstatement of the first two, and then four, and then five employees, do you recall at one time there was discussion between the union and yourself during negotiations as to what would happen if the charges, criminal charges against two of these persons, were dropped?

A. Yes. Do you have the specific meeting this occurred in?

Q. Yes. May 29th. Toward the end of the meeting.

A. You have a quote you would like to read to me?

Q. It depends upon the answer you give me.

A. I don't have it.

Q. I wonder if you would recall specifically a discussion between Mr. Colella and yourself close to the end of the meeting prior to a union caucus in which Mr. Colella said to you "Let us say a person withdraws his charges against one of our employees. Would you then reinstate these people? Then he will be rehired, so now we have those people against whom [376] there is no charges. This is something that has arisen out of the strike. Something if they are found guilty of criminal assault and they are fired."

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And you stated "They are already fired because of the assault." Colella said "If the assault charges were dropped they would be cleared and returned to work".

Trial Examiner: Are you attempting to quote his testimony from the stand?

Mr. Davidson: I am asking him if he recalls this.

Mr. Wayman: Is this a question?

Mr. Davidson: It will be. I have one more word to say, and the question will be asked. I am trying to refresh his recollection by giving him as much of the conversation—

Trial Examiner: Get that other word in and then we can start arguing.

The Witness: The—

Mr. Davidson: I think—the other word—to tie that word in I had better repeat the last phrase.

Trial Examiner: Just the last forty words.

Mr. Davidson: "If the assault charges were dropped they would then be cleared and returned to work". And you answered Mr. Colella, "Yes". Do you recall such an exchange?

The Witness: On which date is this?

Mr. Davidson: On May 29th.

Mr. Wayman: I think I'll have to object to that question.

[377] *Trial Examiner:* What are you reading from?

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Mr. Davidson: Reading from notes.

Trial Examiner: You're not attempting to quote Colella's testimony?

Mr. Davidson: No, I'm not attempting to put this in evidence, but I am just asking if he recalls.

Trial Examiner: I'll overrule the objection. Do you remember saying anything like that?

The Witness: On that date? Let me have that date again.

Mr. Davidson: May 29th. It was a Friday, I think.

Mr. Wayman: We are even letting Mr. Davidson testify to the day of the week now.

Mr. Davidson: That is a matter which the Trial Examiner can take notice of.

Mr. Wayman: Do you remember that question?

Trial Examiner: You can answer that just "yes" or "no".

The Witness: I know I can. I can remember a similar conversation.

- Q. (By Mr. Davidson) Were you informed at a subsequent meeting the charges against these two employees had been dropped?
- A. Do you have a specific meeting there that you are referring to, Mr. Davidson?
- Q. I don't at the moment.

Mr. Wayman: This seems to be a matter of counsel saying he doesn't know and the witness saying he doesn't know.

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[378] *Mr. Davidson:* I thought there was a question pending.

The Witness: I asked you if you knew what particular meeting you were referring to.

Mr. Wayman: And you said no.

- Q. (*By Mr. Davidson*) Do you recall at any of the subsequent meetings you were informed the charges against these employees had been dropped?
- A. I recall I was informed the charges had been dropped against one of these employees. That's the only thing I recall.
- Q. Do you remember which one?
- A. Yes, sir.
- Q. Will you tell us?
- A. Mr. Karpinski.
- Q. What was your position upon hearing the charges were dropped? Did you agree to his reinstatement at that time?
- A. No, we did not. We did not.
- Q. What was your position?
- A. Our position was that he had been discharged until he was cleared by somebody, whether it be a Court, or what it be; the NLRB; or by some agency, or some procedure.—That we considered him discharged.
- Q. And this was at some time subsequent to the first conversation that you recall having occurred with Mr. Colella, is that right?
- A. Yes, sir.
- [379] Q. Mr. Ferrell, do you recall on May 28th Mr. Coyne stating to you that the—the reinstatement—to this effect: Words to this effect: That if the question with respect to—if the super-seniority condi-

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tion were dropped by the company in his opinion the rest of the settlement could be worked out; that this was the only issue keeping you apart?

- A. On the 28th?
- Q. Yes. Do you recall Mr. Coyne making such a statement?
- A. No, I don't remember him making that statement. I have some other statements he made on that day.
- Q. There were many made on all days, is that correct? Do you recall Mr. Colella making a similar statement during the side bar conferences on May 14th or May 15th?
- A. I don't have any—
- Q. Pardon?
- A. I don't have any notes to that effect.
- Q. Do you have any notes on the side bar conferences?
- A. No.

Trial Examiner: Do you have any recollection of any such statement, apart from notes?

The Witness: The nearest that I can remember of any statement coming close to what Mr. Davidson said was Mr. Colella probably said if we could see our way clear to drop this twenty-year super-seniority that probably we could work something out on the other issues and reach an agreement. [380] That's as close as I can remember as to what he said.

- Q. (By Mr. Davidson) Was that during the side bar conferences?
- A. We had many discussions, Mr. Davidson.
- Q. You can't place this?
- A. I can't place this on that date, no, sir.

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- Q. I would like you to take a look at General Counsel's Exhibit Number 12, if it is available there. The May 27th replacement policy, I believe. Do you have it before you?
- A. Yes, sir.
- Q. Do you recall when this was given to the union? Was this at the same time it was posted in the plant?

Trial Examiner: This wasn't posted in the plant, was it?

The Witness: On June 15th it was.

Trial Examiner: June 15th; but you are speaking of May 28th. Go ahead.

The Witness: Your question is was a copy of this given to the union on May 28th?

- Q. (*By Mr. Davidson*) No. At the time it was posted —first I will ask it that way. Was it given to them on May 28th or any time prior to June 15th, when it was posted in the plant? Or was it, in fact, given to the union for the first time on June 26th?
- A. This was explained to the union on May 28th. They were not given a copy of it—I am quite sure they were not given a [381] copy of it—until the 26th of June.
- Q. I would like to ask you a question as to the operation of this policy. I would like you to assume employee "X", who has been permanently replaced in his job in the plant as of, let us say, June 15th—
- A. "X" has been replaced?
- Q. Has been permanently replaced. What seniority on June 15th would "X" have? Let's assume he had ten years prior service.
- A. If he had been replaced he didn't have any.

- Q. He had no seniority?
- A. He had no status as an employee; no seniority and no nothing.
- Q. Let's assume on June 18th Employee "X" crossed the picket line and reported for a job and was told he had been replaced. Employee "X" was suitable for available work and was rehired. What seniority would Employee "X" have as of the date of his rehire?
- A. If he was rehired, accepted for rehire, reinstatement and rehire—just a minute.
- Q. May I suggest that the answer is thirty years?
- A. I would suggest that the answer is twenty years.
- Q. Is it your testimony that returning strikers or—the returning strikers whose jobs had previously been filled by replacement, who returned prior to the termination of the [382] strike—that they were not credited with their prior service or seniority prior to the commencement of the strike?
- A. Frankly, I don't know.
- Q. Would Mr. Bertone be in a better position to answer that question?
- A. Yes. I never did any of this personally, so I can't tell you.
- Q. I want to direct your attention now, Mr. Ferrell; to a meeting of June 24th, and a discussion of the reinstatement of employees Karpinski and Skiba. Do you recall on that date—during the discussion of that issue—the question was raised by the union as to what would happen to Karpinski and Skiba if you agreed to take them back after a ninety-day layoff?
- A. Yes, sir. I do.

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Q. Do you recall there were three alternatives discussed? Three possibilities?

A. As to what would occur to them after the thirty days?

Q. Yes.

A. That—

Q. Do you recall there was a discussion as to what would happen to them if they had been replaced? Do you recall what would happen if their jobs had been abolished? And as to what would happen to them if their jobs were open?

A. There was such a discussion.

[383] Q. Do you recall what you said?

A. It was determined there were no openings on the old jobs due to the reduced volume of business, and both Val Skiba and Karpinski would be moved—would go to their old job or be moved under Section 14 of the contract.

Q. Do you recall specifically there was discussion as to what would happen to them if it turned out they were replaced?

A. No, sir. I do not.

Q. Do you recall saying if they had been replaced that they would be considered for the next opening that came along that they were qualified to do? Saying, further—if this will help to refresh your recollection—if they had not been replaced and their job was still open they would go immediately; and if the job no longer existed they then would be considered for other openings as they came along? There were three different possibilities there. Does that refresh your recollection?

- A. No, I only have the conclusion of all of this, which is they would go to their old job or be moved under Section 14 of the contract.
- Q. You say you only have the conclusion. When you say that, that's all you have in your notes?
- A. That's all I have in my notes.
- Q. How about in your mind? I'm asking you to refresh your recollection.
- A. I do not recall this other conversation.
- [384] Q. Would Section 14 apply also if they had been replaced? Is that what you said at the time?
- A. I don't recall any conversation about them being replaced.
- Q. You didn't know at that time whether or not they had been replaced, did you?
- A. Personally, no.
- Q. And the union was inquiring as to what would happen to Skiba and Karpinski in the event you agreed to reinstate them after a disciplinary layoff, is that correct?
- A. I said I don't recall this part of the conversation that you are quoting from.
- Q. Do you recall there was such a discussion, apart from these specific words which I quote or which I ask you if you recall?

Mr. Wayman: I'm going to object to that because "discussion, apart from words", that is kind of meaningless.

Trial Examiner: It certainly is. I don't know how you expect this witness to recall specifically what was said with respect to these two employees in the course of fifty-two or fifty-three meetings.

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Mr. Davidson: I think he has demonstrated ability to recall some of the things, and I think it's fair to inquire of him.

Trial Examiner: Not the details such as you are going into. I know what you are pushing for. You had your own [385] witnesses on the stand to testify to these matters.

- Q. (*By Mr. Davidson*) With respect to Respondent's Exhibit 9, which was received in evidence, I believe you were asked the question as to who paid for this advertisement. Do you know of your own knowledge?
- A. I saw posted a list of names of those who had contributed to the payment of the ad.
- Q. Where did you see this list of names posted?
- A. It was posted over in one of the departments by the employees.
- Q. Posted on a company bulletin board?
- A. I don't recall where it was posted. I recall seeing the list.
- Q. What did the list say?
- A. I cannot tell you what it said.
- Q. Do you remember if there were any names of members of supervision on the list?
- A. There were a great many names.
- Q. Of members of supervision?
- A. Supervision, yes. I am sure.
- Q. And other people outside of the bargaining unit?
- A. Yes, sir. For the benefit—
- Q. You don't know who posted the list?
- A. No, I'm not even sure it was posted. I remember seeing it. Somebody showed it to me.

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[386] Q. You don't know who initiated it?

A. No. I remember seeing the list of names. That's all.

Q. Did you contribute?

A. No, sir. I was busy in the negotiations.

Mr. Davidson: If I can have just a minute, I think I may be through. That's all.

Trial Examiner: Do you have any redirect?

Mr. Wayman: Very, very brief.

RE-DIRECT EXAMINATION

Q. (*By Mr. Wayman*) Were there any people who were working on production jobs in the plant during the strike whose names appeared on this list you have described in connection with Respondent's Exhibit 9?

A. Yes, sir.

Q. About how many names would you say were on that list, as nearly as you can recall?

A. It was a very long list. I would say maybe two hundred names.

* * * * *

Raymond Bertone—Direct.

[391] RAYMOND BERTONE a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: Will you state your name for the record please?

The Witness: Raymond Bertone.

Trial Examiner: I didn't get your first name.

The Witness: Raymond.

Trial Examiner: Where do you live, Mr. Bertone?

The Witness: 1227 East 28th Street, Erie, Pennsylvania.

DIRECT EXAMINATION

- Q. (By Mr. Wadman) What is your job?
A. Administrative specialist personnel department.
- Q. Who is your immediate superior?
A. Mr. Gordon Ferrell, director of industrial relations.
- Q. How long have you held this job?
A. Nine years in the personnel department.
- Q. Will you tell us briefly your duties in this position?
A. Employment manager, hiring and processing new applications for the factory, taking care of personnel records, assisting foremen and operation managers on interpretation of the union [392] contract and any other duties assigned relevant to the personnel department.
- Q. Do you recall the strike in the spring of 1959?
A. Yes, sir, I do.

Raymond Bertone—Direct.

Q. Will you tell us whether or not in the course of this strike the company attempted to hire people to work in the plants?

A. Yes, they did.

Q. Did you have anything to do with that?

A. Yes, sir, I did.

Q. Will you tell us how the company went about hiring these people?

A. After the letter of May 3rd when the company announced they were going to start hiring replacements, I was instructed by Mr. Ferrell to set up a procedure to start hiring replacements. At first, due to newspaper advertisements, and what I mean by advertisements, I mean exposure by the union and by newspaper reports that we were going to reopen the plant, many people began to call Erie Resistor inquiring about employment. These people were told to come to the Erie Resistor Corporation employment office. When they tried to come there—

Q. Where is that?

A. 644 West Twelfth Street.

Q. That is where the plant is located?

A. That's right, sir. Many of the people did not get in [393] because they were blocked by pickets so therefore—

Mr. Davidson: I object. I don't know this witness is able to testify to that.

Mr. Fleischut: Objection.

The Witness: The door to the personnel office is within ten feet of my office.

Trial Examiner: I will over rule the objection.

Raymond Bertone—Direct.

- Q. (By Mr. Wayman) You could see this?
- A. Yes, sir. Therefore we were forced to interview these people at another location, which was 412 G. Daniel Baldwin Building located here in Erie, Pennsylvania. Then when applicants began to call our office they were referred to this office for interview and possible employment. These applicants came to the office and were given our standard application form and interviewed by myself or by my associate Mr. Robert Sparks who at that time was supervisor of placement and training. In interviewing these people we were aware at all times we would not lower our standards in hiring these people. The females still had to be high school graduates. The men had to have some kind of former work experience or had some kind of back ground in working or had to be neat, personable and had to meet our qualifications for hiring. After we accepted the applicant, arrangements were then made to get them into the plant.
- Q. Did you accept all of the people who applied?
- [394] A. No, sir, I did not. The reason—
- Q. Go ahead.
- A. The reason is we did not lower our hiring standards.
- Q. Now it has been testified that you had some three hundred applications for employment. Do you recall that?
- A. Yes, sir, that is correct.
- Q. You did not employ all three hundred of the people who applied?
- A. No we did not.
- Q. Did any of the people you did hire fail to show up for work?

- A. Yes, they did. For example, I would check with the operations manager the following morning to find out if the applicant arrived at the department assigned, and they would say no.
- Q. Did any of the people that you hired tell you why they did not apply or did not show up?
- A. Some told me directly and others told me indirectly. For example, parents would call—

Mr. Fleischut: Objection what other people said to him.

The Witness: What I mean by—

Trial Examiner: Wait a minute. When an objection is made don't try to answer the question. In view of his position I think he can state what, if any, reasons were given for an applicant not appearing for work. Over ruled.

[295] *Mr. Fleischut:* Would it not be preferable to have the applicant testify?

Trial Examiner: I don't think so in this instance, no. All right, go ahead.

- Q. (*By Mr. Wayman*) Go ahead, Mr. Bertone.
- A. As I was about to say, when I talked directly to the applicant they either told me that their parents objected to them coming in, their friends objected to them coming in, and the applicant also told me "we tried to get in the plant and saw the pickets" and they were afraid and decided not to come in.
- Q. Now when you interviewed these people, what did you tell them about the tenure of their employment, if anything?

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A. After receiving them as a permanent employee I told them they were accepted for employment and we then told them they would not be laid off or discharged due to the result of settlement of the strike.

Q. Are you familiar with the so-called twenty year policy you have heard about in the court room here?

A. Yes, I am.

Q. When did you first become aware of this policy?

A. May 27th, 1959.

Q. Did you follow the procedure that is outlined in that procedure and policy in placing employees?

A. Yes, sir, I did.

[396] Q. Will you tell us whether or not your duties include supervision of the keeping of records of lay off and recall of employees?

A. Yes, sir, it does.

Q. Did you at my request and for purposes of this hearing prepare a summary showing the numbers of employees in various categories working on production and maintenance jobs during the strike week by week?

A. Yes, sir, I did.

Mr. Wayman: Will the reporter please mark this document respondent's exhibit 11.

Trial Examiner: Respondent's 12 is the next one.

(Thereupon, a document was marked Respondent's exhibit 12, for identification.)

Q. (By Mr. Wayman,) Mr. Bertone, I show you a document which has been marked for identification as respondent's exhibit 12 and ask you what that is.

Raymond Bertone—Direct.

A. This is report of employees working on production and maintenance jobs during the strike beginning of the week of the first replacements.

Q. Is this a paper I asked you to make up for presentation at this hearing?

A. Yes, it is.

[397] Q. What was the source of your information for preparing that paper?

A. Our personnel records and payroll records.

Mr. Wayman: I offer respondent's exhibit 12.

Trial Examiner: Any objection?

Mr. Fleischut: One moment. None, sir.

Trial Examiner: Let me ask you this, Mr. Bertone. What period of time is covered by these reports?

The Witness: The dates are stated.

Mr. Wayman: Would the Trial Examiner like a copy to look at?

Trial Examiner: I just wanted to fix some time.

The Witness: The dates are May 4th all the way up to June 22nd, when the strike ended.

Trial Examiner: All right, the chart may be received in evidence, or the list, whatever you want to term it, may be received in evidence as respondent's exhibit number 12.

(The document heretofore marked Respondent's exhibit 12, for identification, was received in evidence.)

Raymond Bertone—Direct.

- Q. (By Mr. Wayman) Mr. Bertone, also at my request did you prepare a chart or list showing the total hourly employees employed at the Erie Resistor Corporation in Erie during the weeks following the end of the strike?

A. Yes, sir, I did.

- [398] Mr. Wayman: Will the reporter please mark this document respondent's exhibit 13?

(Thereupon, a document was marked Respondent's exhibit 13; for identification.)

- Q. (By Mr. Wayman) Mr. Bertone, I show you a paper which has been marked for identification as respondent's exhibit 13 and ask you what that is.

A. This is a report, sir, requested by you to show the total employment of Erie Resistor Corporation on the week following the end of the strike.

Q. This is limited, I think, to hourly employees?

A. Hourly bargaining unit employees.

Q. And it shows bargaining unit and others?

A. Non-bargaining unit, yes.

Q. What was the source of this report?

A. Payroll records and personnel records.

Mr. Wayman: I offer respondent's exhibit 13.

Mr. Davidson: Subject to cross examination.

Trial Examiner: All right the report may be received in evidence and marked as respondent's exhibit number 13.

(The document heretofore marked respondent's exhibit 13, for identification, was received in evidence.)

Raymond Bertone—Direct.

- Q. (By Mr. Wayman) Now referring to respondent's exhibit 12, I see a column on there marked "temporary replacement [399] new employee. Will you refer to the exhibit?
- A. Yes, sir.
- Q. You have that column?
- A. Yes.
- Q. Did you in fact hire temporary replacements during the period of the strike?
- A. Yes, we did.
- Q. Is it correct to say the first of these temporary replacements were hired sometime during the week of June 8th?
- A. Correct.
- Q. What became of these temporary replacements when the strike ended?
- A. They were terminated within one week at the end of the strike.
- Q. Did you also interview temporary replacements?
- A. Yes, sir, I did.
- Q. You and Mr. Sparks?
- A. Mr. Sparks, both of us.
- Q. What did you tell temporary replacements about the tenure of their employment?
- A. We told them they would be working anywhere from five minute to the end of the strike. If the strike was to end immediately, they would be terminated immediately.
- Q. Did you come to work every day during the strike?
- A. Yes, except for days of April 2, 1959, and May 7, 1959 [400] and May 8, 1959.

Raymond Bertone—Direct.

Q. What happened on those days?

A. Those days there was mass picketing in front of our plants and I was unable to get in.

Mr. Davidson: I object. I think this issue Mr. Wayman is about to go into is not relevant to this proceeding.

Mr. Wayman: The courts have decided cases like this and have considered the existence of violence and mass picketing very relevant.

Mr. Davidson: I would be interested in hearing—

Trial Examiner: I agree picket line misconduct is a very important element if it is an issue in the case but is it an issue in this case?

Mr. Wayman: You mean the union may stipulate—

Trial Examiner: No, I don't see where there is any picket line misconduct, advance as a reason for not reinstating any of the strikers. There is certainly no defense raised on picket line misconduct in your answer.

Mr. Wayman: That is not the point at all. The point is when there is a picket line that misbehaves it becomes necessary to assure people these jobs will not be terminated after the end of the strike. This is a factor to be taken into consideration.

Trial Examiner: You may have that as a subjective reason for putting in superseniority, but how is picket line [401] misconduct an issue in this case, under the pleadings?

Raymond Bertone—Direct.

Mr. Wayman: I think it is necessary to prove it because they have alleged an improper motive on our part, and we have said our motive was not improper.

Trial Examiner: I don't think it is improper. It is illegal.

Mr. Wayman: Illegal? Excuse me.

Trial Examiner: Illegal as distinguished from any other motivation that you might have. I don't see where picket line misconduct is an issue in this case.

Mr. Wayman: I think the existence of an illegal picket line, the violence, the contempt of court, is important simply to show that this is a reason why the company did and had to grant job assurance and we will show why it had to be so-called superseniority.

Trial Examiner: You haven't convinced me it is an issue in the case and even though it may have been one of your reasons for putting in superseniority—

Mr. Wayman: I believe we are entitled to put this in.

Trial Examiner: You think superseniority turns on the question of picket line misconduct?

Mr. Wayman: No, sir, but I think it is a factor to be considered by the Board and the courts and the Trial Examiner in looking at the motives of the employer and what it did.

Raymond Bertone—Direct.

[402] *Trial Examiner:* I don't think the issue is squarely presented by this witness here.

Mr. Wayman: Except that he experienced it.

Trial Examiner: I am going to let his answer stand as to why he didn't come in on these days but I still don't consider mass picketing, or picket line misconduct as an issue in the case. I will let this answer stand but by letting it stand it doesn't mean I am going to go into the issue of violence or misconduct on the picket line, as a reason for putting in your superseniority policy or plan.

Mr. Wayman: The next question I am going to ask is whether or not you had any complaints by workers, people who worked during the strike of damage to their property, injury or threats?

The Witness: Yes, sir, I did.

Mr. Davidson: Same object.

Trial Examiner: Well, now, the question is coming up squarely. I still say that under the pleadings that is not an issue in this case. By that I mean you cannot get into this record but I will permit you to make an offer of proof of everything you expect to prove by way of misconduct but as far as taking testimony, I can't see where it comes within the issues of this case.

Mr. Wayman: It depends on what the issue of the case is, of course. If the issue is simply superseniority per se [403] is not violative of the Act, then most of what we have talked about here is irrelevant because certainly it is a fact that the

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company did install superseniority policy prior to the end of the strike, and have continued it since. I don't think there is any dispute about that in the record. That appears not to be the only issue raised by the general counsel in his complaint. He seems to have it in the alternative that even if it is all right to have such a policy your motive is bad; you didn't need it and the fact we did have this dreadful situation—

Trial Examiner: I don't think that is his theory.

Mr. Wayman: I think it is his theory.

Trial Examiner: Is that your theory?

Mr. Fleischut: I prefer to state my own theory, if I may.

Trial Examiner: Well, state it.

Mr. Fleischut: There are two paragraphs in the complaint dealing with superseniority as a two-theory set out. There are two paragraphs that deal with it. Now the first is the per se matter which I am specifically referring to, and the Board's first case on this matter, Potlatch Forest and later cases in this matter the Board found superseniority discriminatory under the facts of the cases presented so that both of these theories are presented at this time.

Mr. Murphy: May I ask a question?

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Mr. Murphy: It is not true in the later cases the Board went into the motive of the employer in granting superseniority?

Mr. Fleischut: Well, of course, discrimination deals heavily in the area of motive, it most certainly does.

Mr. Murphy: And the circuit courts have held that motive is the controlling factor.

Mr. Wayman: Some—

Mr. Davidson: I think there is another consideration in this case which makes this wholly irrelevant, and that is this. We have testimony now from union witnesses and company witnesses that the assurances given to these employees was in effect they were permanent replacements. Now as far as I know under Mackay Radio you can give this assurance without there being violence or anything else. The question here is after having given this assurance for which they would like to introduce this evidence for support for having done it, they then went ahead and instituted the twenty year superseniority plan and made that or its equivalent a condition of the settlement of the strike, and I think from the point of the assurance on for which they don't need any of this evidence, it then becomes irrelevant.

Mr. Wayman: I would say it would become irrelevant if the general counsel and the union's counsel were to [405] stipulate we couldn't get people until and unless we gave them this job assurance.

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Trial Examiner: I think that has been your testimony all along.

Mr. Wayman: Yes, but I understand the general counsel says that is not so. He hasn't proven it, I will grant you, but he says it isn't so.

Trial Examiner: We spent three days taking testimony on the bargaining sessions.

Mr. Wayman: That's true.

Trial Examiner: The uniform testimony, as I understand it, was the company had to have superseniority to get replacements.

Mr. Wayman: If that is established I can depart from this except there is one other point, and maybe the general counsel will concede this also, and that is they want to know why—they say you changed your position on some of these things in the course of bargaining. Assume we did, and Mr. Ferrell was very frank about what we did in bargaining. Now the events of May 7th and May 8th contributed in a substantial part to our change in position on such things as union shop. This is a complete story.

Trial Examiner: Now we have had much testimony on the bargaining sessions and the positions of the parties and now it strikes me that you want to show as a reason, maybe a subjective reason for insisting upon superseniority, but [406] the fact that some of the replacements were experiencing difficulty in going through the picket line or various other forms of misconduct. I don't see where that plays any part because you have already stated your

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position to the union why you didn't these replacements and in an economic strike unquestionably you have a right to replace the strikers.

Mr. Murphy: I would like to point this out, if that is the context of the case, there is no dispute that we had to grant superseniority to get replacements.

Mr. Davidson: That isn't what I said.

Mr. Murphy: Let me finish. Then there is no need for this testimony. However, this is not, as I understand it, the general counsel's position. For example, the general counsel offered exhibits in this case which were admitted as to the labor surplus in Erie. I have forgotten the numbers now but there was a series of them, reports of the Department of Labor. I understood the general counsel's position to be the relevancy of those exhibits was there were so many unemployed people in Erie we could have easily gotten replacements without any form of job assurance or superseniority.

Now it is therefore necessary for us to prove that regardless of the number of people unemployed in this town, these people or many, many of these people would not come to work at Erie Resistor, subject themselves to this kind of violence for a temporary job and that they had to be granted some sort [407] of guarantee of superseniority, a tenure, you might say, to sustain the violence which they are subjected to. Now if it is not the general counsel's purpose for offering these exhibits as to the labor surplus area, I think we should know it.

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Mr. Wayman: I think the exhibits should then be withdrawn.

Mr. Murphy: I think the general counsel will frankly admit this is the purpose of those exhibits. Is that not so?

Trial Examiner: Mr. Davidson, go ahead.

Mr. Davidson: I trust the statements made by Mr. Murphy as to our position and what the evidence will show is not to be taken as evidence. We have not stated it was necessary to grant superseniority and the record does not show that the company assured people of superseniority. I think that is the thing which is clear in this case. Every witness has said—

Mr. Wayman: Well, let's not talk about—

Trial Examiner: No, don't interrupt.

Mr. Davidson: I am arguing on the evidence in the record.

Mr. Murphy: And there will be more.

Mr. Davidson: The evidence is applicants were assured they would not be terminated as a result of a settlement of the strike. I think that has been what Mr. Bertone has said, in effect, and I think that is what Mr. Ferrell said, [408] in almost those words, but that is not, as I know it, an assurance there would be superseniority for these employees at the end of the strike. I think these are two very different things, and I think that insofar as an assurance to employees that they would not be terminated as a result of the settlement of the strike was

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concerned, this is an assurance, as far as I know, which is given to permanent replacements merely by virtue of calling them permanent. It is nothing more than that. We don't have to go into this evidence to show that assurance could have been given. The question what the company did after they gave that assurance. This is the question in this case.

Trial Examiner: You want to say anything, Mr. Fleischut?

Mr. Fleischut: Frankly, sir, I feel a bit out-classed at this point and I think I will stand on the pleadings and on the evidence. It seems like someone setting up a trap here for me to step into, walk into some kind of a demurrer. I have stated the theory of my case in my pleadings and my evidence and what I intended to put in and what the evidence proves I prefer to argue in a brief or at the close of the hearing. I don't want to rehash my whole theory for fear a slow-witted person like myself will walk into one of these traps laid about what I said or what I didn't say. I want the witness' testimony to speak as to what was said and then argue the legal results of that later on. I think my [409] position is amply clear, and it is not—I am trying to be evasive but we are playing with words here.

Trial Examiner: I don't know about that. I think that is in line with most representatives of the general counsel. They refuse to be pinned down on any theory. Everything is an issue in the case and no specific theory. I have had that time and time again.

Mr. Fleischut: No, sir.

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Trial Examiner: They say we rely on the complaint, and the complaint tells you little of anything, to be frank with you, in my opinion. What is your position with respect to this question now of picket line misconduct and also your Department of Labor exhibits which went in as general counsel's exhibits 38, 39, 40, 41?

Mr. Fleischut: I don't mean to be evasive but there are four principal cases cited by the Board in this area. This is not an original idea. There has been these four cases. As to the exhibits the purpose of them is to show it is a labor surplus area, that people were available to come to work. I don't know how I go beyond it—tell me once again exactly what you want me to comment on, sir, and I will try to address myself to it. I said at the time I put the exhibits in it was for that purpose, and I am not shifting now.

Trial Examiner: I received the exhibits in evidence. [410] I don't know what significance they had but I received them in evidence. I am still not convinced that picket line misconduct is an issue in this case. I don't recall any testimony that during the bargain negotiations any of the company representatives ever advanced as a reason for supersensitivity that it was necessary because of the conduct of the pickets.

Mr. Wayman: Well, the difficulty with that—two difficulties with that problem, first, the general counsel has alleged a lot of things. I think he defined them as minuscule at some point or another. Maybe that is not in the hearing. Allegations we refused to

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bargain by changing our position on issues, by meeting only with the mediator, and—

Mr. Fleischut: There is no testimony on that point.

Mr. Wayman: These are the charges, while they may not be the general counsel's real position, nevertheless we feel we must meet them. Mr. Ferrell when he was on the stand yesterday talking about the position the company took on union shop and check off and some of these other union security provisions said the company's position changed I believe after May 11th—the real bad picketing took place on May 7th and May 8th. We must keep in mind the sequence of events. The company notified the public generally and sent a letter to the employees on May 3rd saying [411] "We are going to begin to replace people."

Trial Examiner: Was that reason ever advanced to the union representatives during the negotiations?

Mr. Wayman: As a need for superseniority?

Trial Examiner: That's right.

Mr. Wayman: I would have to ask my witness that question. Excuse me, sir.

Trial Examiner: All right.

Mr. Wayman: As usual, we will have to check all of these notes.

Trial Examiner: I mean it strikes me that is a pretty outstanding incident, in my opinion. I could very well see how you over look other matters in the

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court of fifty-four meetings but it strikes me that if picket line violence at one or two of these meetings and you say it is limited to two days or three days—

Mr. Wayman: No, no.

Mr. Murphy: Oh, no, no.

Mr. Wayman: I mentioned the two or three days because of the significance of the time table here. The picketing was bad from the beginning, the beginning of April 2nd—you remember Mr. Bertone said he couldn't get in on April 2nd, the day after the strike.

Trial Examiner: That sort of sneaked in there. He couldn't get in. Why couldn't you get in? Maybe there [412] had been a snow storm.

Mr. Wayman: No, no, they said because of the pickets. Now an injunction was sought in that week and obtained by the company from the Common Pleas Court. The union violated the injunction and we have certified copies of the court records here and the transcript and they continued to violate the injunction. On May 3rd the company put out its letter saying "We are going to hire replacements," and then the picketing becomes horrendous, that is on May 6th, 7th and 8th.

Trial Examiner: Let me interrupt a moment? What do you want to prove by this? What is the purpose of showing picket line misconduct?

Mr. Wayman: I want to improve the employer reasonably believed that for this reason, among others, it was necessary to give these people some

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assurance that could be practicably put into effect that they would not be laid off or discharged or otherwise thrown out of their jobs at the end of the strike.

Trial Examiner: You mean picket line misconduct or violence was one of the reasons why you wanted superseniority?

Mr. Wayman: That was one of the reasons.

Trial Examiner: Is there any real objection to that? Maybe we are fighting over nothing.

Mr. Wayman: Motive is always subjective.

Trial Examiner: It is a little more than subjective in this case because there is no evidence that reason was ever [413] given to the union for superseniority.

Mr. Wayman: I don't know that it was.

Trial Examiner: I haven't heard a line from any of the witness and I have heard them testify to everything that was considered material.

Mr. Murphy: There is one further point that harks back to these exhibits. The company had to do this to get employees, to get replacements to withstand this violence in order to come in to work. That is a fact and that's what we would like to prove that we did not have, in effect, a surplus labor market willing to come to work at Erie Resistor.

Trial Examiner: I don't know if I can litigate that. I think going along with what Mr. Wayman says it was necessary to give the seniority, the

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superseniority, because of picket line violence. Now that was one of the reasons, one of the factors and one of the considerations. Is there any objection to that?

Mr. Davidson: Yes, I do have.

Trial Examiner: Maybe we have a rifle on a mole or something.

Mr. Davidson: I don't want to litigate violence when it has nothing to do with the issue. In the first place I am starting to use the word myself but I think what we are talking about is merely mass picketing on three days.

Mr. Murphy: There is more than that,

[414] *Trial Examiner:* You see I walked into that two when I limited it to two days.

Mr. Davidson: I think we keep having two very different things confused. One is the assurance given to the strikers and the other is what the company did—to its workers. I think the only possible basis for introducing this and I don't concede it is relevant but I think the only possible basis would be to justify the assurance given to the people who came in as permanent replacements and I don't think it is even necessary to give a justification for calling people in as permanent replacements and assuring them exactly—in other words, exactly what you can assure the replacements.

Trial Examiner: I tell you the way I look at it and the only fair way of looking at it, without attempting to get into some perhaps long litigation

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over this question of misconduct, I would take testimony to the effect, as I have stated, if this is one of the reasons the company instituted superseniority because of misconduct, I would take general testimony along that line.

Mr. Wayman: That's what I would propose to offer.

Trial Examiner: As far as coming in on individual acts, did so and so yell at somebody, and did they yell back, I don't intend to go into that.

Mr. Wayman: I think we might be here forever if we started to do that but it is important because, as I say, our [415] motive has been challenged, our reason for doing this. We want to show everything we can that will back up our motive in giving superseniority and in giving job assurance; that is the thing that really entered into our consideration.

Trial Examiner: I will take testimony along that line, and, plus, if you want to recall Mr. Ferrell as to whether or not this reason was ever advanced as one of the reasons for instituting or adopting superseniority in the course of the negotiations.

Mr. Wayman: Perhaps we can do this, Mr. Ferrell was asked a question that led to the introduction of general counsel's exhibits — something about three hundred applications and ten thousand unemployed that the general counsel seemed to feel important, and we might after we are through with Mr. Bertone recall Mr. Ferrell and ask him about that. It might be of some assistance.

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Mr. Fleischut: Sir, I would like to raise this point. Perhaps it would be possible for us to have some clearly defined lines as to how far we go on this. I know from experience this is a Pandora box and when you open it there are going to be individuals referred to and there will have to be long rebuttals and so forth. Perhaps there is an area that we could stipulate as to mass picketing on certain days or certain instances and then the company could take it from there, and state just what the reason and so forth. Once we [416] open the door to "what did you see this day and what did you see that day, and what happened this day and what did the officers say," we are into it, aren't we?

Trial Examiner: No, I don't intend to go into that. I will be perfectly frank with you on that.

Mr. Wayman: Of course, I might say this in answer to Mr. Davidson's proposition, he hasn't heard our case yet. We still have to put in the evidence by the people who did these things rather than by hearsay, as to what people were told and when they were told. Now I refer to the case Wilson and Company, v. NLRB 120 Fed. 913, an early case, in 1941, in which the fact there was violence and mass picketing, misbehavior was considered of substantial importance in determining an issue like this one.

Trial Examiner: In the cases I have had it has always been interposed as a reason for not employing the striking employees, and that issue was disposed of by the NLRB when it refused to issue a complaint on the employees who were discharged. We are not going into that.

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Mr. Davidson: I would like to know what the issue was in Wilson that was similar to this.

Mr. Wayman: Let me read very briefly what the court said, and, of course, this is just a brief excerpt.

Trial Examiner: This is an old case, not that I know it off hand.

[417] *Mr. Davidson:* May we go off the record for this?

Mr. Wayman: I don't think we should be off the record.

Trial Examiner: No.

Mr. Wayman: "It is also claimed the petitioner abandoned its long standing seniority policy. This is plausibly explained by the fact the petitioner had hired new employees in number sufficient to operate the plant. He was not obligated to replace them and under such circumstances his previous seniority practice could not be followed."

We are going to demonstrate that. If our motive was not challenged—just to say superseniority per se is bad, that is one thing but our motive is challenged and we want to prove we had a proper motive.

Trial Examiner: I think that would be in line with what I have stated.

Mr. Wayman: I think so too.

Trial Examiner: If that is one of the reasons why you put it in, all right, but I am not going to

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require that you have forty or fifty witnesses to support your reason.

Mr. Wayman: Oh, dear, no, no. I think one or two witnesses will be plenty. I am not going into it to any extent with Mr. Bertone other than what I have said right now. The difficulty, of course, if you present the thing in an orderly way and put the witness on the stand you don't like to haul him off and say "I will call you back and talk about [418] violence sometime later."

Trial Examiner: Where were we?

Mr. Wayman: I think he had answered the question I asked him and I was about to proceed to a new subject.

Trial Examiner: All right, go ahead.

- Q. (*By Mr. Wayman*) Mr. Bertone, do you recall a meeting on June 26th with a union representative?
A. Yes, sir, I do.
Q. What happened at that meeting, tell me in your own words as nearly as you can recall?
A. Mr. Ferrel, my superior, instructed me that union representatives were coming in to see us that morning to get a list of the people who had been replaced during the strike. Mr. Colella, Mr. Bordonaro, and to the best of my recollection I remember those two and I believe a Mr. McCue was with them, and the sole purpose was to get this list of replacements, or replacees.
Q. Did you have such a list?
A. Yes, sir, I did. No, I am sorry, not in the morning. I did not have the list ready for them in the morning. I told them I would probably have it for them that afternoon because I had to do more checking.

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Q. Did you obtain such a list in the afternoon?

A. Yes, sir, I did.

Q. What did you do with it?

[419] A. I turned it over to the gentlemen I just mentioned.

Q. Did you discuss this list to any extent?

A. No, not to any extent.

Q. I would like you to look at general counsel's exhibit 29, please. Do you see general counsel's exhibit 29?

A. Yes, I do.

Q. Is that the list to which you make reference?

A. Yes.

Q. Will you tell us how you went about making up that list?

A. Upon receiving instructions to give the union a replacement list, I then went to all operation managers, the manager of the electronics division and the foremen of the pastics division who have been keeping a running record of their replacements, to get the information to give to the union.

Q. That was the source of your information?

A. That was the source of my information, yes, sir.

Q. Did you subsequently give the union another list?

A. Yes, sir, I did.

Q. Would you look at general counsel's exhibit 30, please. You have general counsel's exhibit 30?

A. Yes, sir, I do.

Q. Is that the list you gave the union on July 6th?

A. Yes, sir.

Q. And yesterday I believe you were in the court room [420] were you not, Mr. Bertone?

A. Yes, sir, I was.

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- Q. Were you present when we entered into a stipulation regarding three people?
- A. Yes, sir, I was.
- Q. One of them was a gentleman named High L. Nelson. Do you remember that?
- A. Yes.
- Q. Do you know Mr. Nelson?
- A. Through bowling with him in the bowling league.
- Q. He replaced a Mr. Rolland Myers?
- A. He replaced him on job 529, yes.
- Q. The paper you have says 530. How do you explain that?
- A. Job 530 is a classification, classified as set up "B" grade. This is a long standing classification with the company which was used as a sort of training classification to job 529 set up "A" grade. The procedure was in former contracts and former procedure that the man in order to be a 529 had to be on set up "B" grade at least one year in this classification. When we started hiring our replacements, Mr. Nelson being brought in as a new employee had to be trained in our way of doing things, knowing our machinery and procedure, our production methods, and not knowing this we then put him on job 530. When he became sufficiently trained on 530 he would automatically have been upgraded to 529.
- Q. Did anybody else go in 529 in place of Mr. Myers?
- [421] A. No, sir.
- Q. What is the nature of the work on jobs 530 and 529 with relation to each other?
- A. They are, sir, helping to keep the assembly line going which most of our operations consist of assembling of electronic components. The set up man is

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supposed to see the material is there, to make adjustments on machinery, to help the assemblers on the line, procure any kind of material or whatever they need to keep production going.

- Q. Is there any substantial difference in the kind of work done on job 530 from the kind of work done on 529?
- A. Not too much, sir; not too much in detail. The only difference is the 529 man will have a higher degree of responsibility than the 530 man.
- Q. I am going to ask you whether or not these lists you have identified again represent the application of this written policy of May 27th which I believe is general counsel's exhibit 12? Will you look at general counsel's exhibit 12 please?
- A. Yes, sir.
- Q. You have general counsel's exhibit 12?
- A. Yes.
- Q. Do you remember my question?
- A. No, sir. Would you rephrase it please?
- Q. Whether or not the replacements shown on this list represent [422] the application of the policy you are now examining?
- A. Yes, sir, it does.

Mr. Wayman: I have no more questions on direct.

Mr. Davidson: If it is all right, I will cross examine him first.

Trial Examiner: What did you say, Mr. Davidson?

Mr. Davidson: If it is all right I will cross examine first because I am ready.

Trial Examiner: All right, it doesn't make any difference.

CROSS EXAMINATION

Q. (*By Mr. Davidson*) Mr. Bertone, you stated employees were told to come to the employment office at the plant and many people couldn't get in. Is this on the basis of your observation through the window of the plant?

A. Yes, and phone calls, when people called back and said "I tried to get into your employment office but I couldn't."

Q. On what dates did this occur?

A. This occurred after May 11th.

Q. When did you move the employment office to the other location?

A. In fact I would say the week of May 11th and following.

Q. That was the earliest?

A. Yes, and I will tell you why, if I may.

Q. I am not interested in why.

A. All right, if you don't want it.

[423] Q. Now what qualifications did you seek of male employees. You mentioned neat, personable and previous work experience and I think you said other qualifications.

A. Well, such as attitude.

Q. What else?

A. Any other normal qualifications.

Q. General type qualifications?

A. Yes. Stature, build—I mean physical.

Q. What kind of experience?

A. Well, what I mean by experience—

Raymond Bertone—Cross.

Mr. Wayman: Experience?

Mr. Davidson: Experience.

The Witness: Well, in some—

- Q. (By Mr. Davidson) Specific or just that they had worked somewhere else before?
- A. In some jobs it would be specific experience and other general jobs would be if they worked before.
- Q. Under what circumstances did you talk to applicants if they failed to show up for work? Did they call you?
- A. Yes, sir, they did. Some of them said they didn't want to work in a struck plant.
- Q. Some said they didn't want to work in a struck plant?
- A. Yes, sir.
- Q. Of the three hundred, how many did you accept?
- A. I didn't accept any of the three hundred.
- [424] Q. Of the three hundred applications?
- A. That's right. This is what we had left when the strike was over. I had three hundred more applicants.
- Q. Did you turn all of those applicants down or were these applicants you hadn't got to?
- A. No, the thing is I hadn't gotten to them yet.
- Q. These applications came in during the course of the strike, is that right?
- A. That is correct, sir.
- Q. When did they start coming in?
- A. When they started coming in?
- Q. Yes, that's right.
- A. Whom are you referring to?

- Q. The applications.
- A. The applications?
- Q. That's right.
- A. I would say within one or two weeks.
- Q. One or two weeks after what?
- A. After the strike started.
- Q. These came in by mail?
- A. Some by mail, some by request from people at the plant that had relatives who were interested in coming to work.
- Q. These people filled out a written application and you retained it in the file?
- A. That is correct.
- [425] Q. Until you were ready to interview them, is that correct?
- A. That is right, which is our normal procedure.
- Q. And some of these people then, at the end of the strike you had a reservoir of applications from people?
- A. That's correct.
- Q. Were these people you had interviewed already?
- A. No. Some I did and some I didn't because they were coming in so rapidly.
- Q. I would like you to take a look at respondent's exhibit 12 and 13 which were introduced and described by you. Do you have them before you?
- A. Yes.
- Q. First looking at exhibit 12, the column "week ending" I notice that the last column is 6/22/59.
- A. Yes, sir.
- Q. Does this omit the week during which the strike ended? Should that be the week beginning 6/22?
- A. That should be the week beginning 6/22.

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- Q. That whole column is erroneously titled, is that correct?

Mr. Murphy: It might help Mr. Bertone if you would give him a calendar.

The Witness: Mr. Davidson, what this means, this is what our employment was, the proposition at the end of the week of the 22nd.

- Q. (*By Mr. Davidson*) The end of the week?

[426] A. Yes, these are all beginning the week.

- Q. So that would actually indicate employment as of June 27th?

A. That is correct, if you want one more week. In other words, it would be more accurate to answer your question to just advance it one week. When I made this up I just went that week.

- Q. The week consists of five days?

A. Yes.

- Q. The next column says "clerical and other employees." I notice a constant figure. Were these people working on production and maintenance work during this period?

A. Which figure are you referring to?

- Q. The second column, 140, clerical and other.

A. No, they were not working constantly. They worked sometime in the factory and other times they worked on their clerical duties.

- Q. More in the factory at the beginning of the strike than at the end, is that right?

A. That's right.

- Q. They were not considered permanent replacements, is that right?

A. No, sir.

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- Q. The next column "permanent replacement new employee." This means employees, who had no prior service with the company prior to the union's strike?

[427] A. That is correct.

- Q. Let me go back to the "clerical and other" column for a minute. At the end of the strike did all 140 go back to their original jobs, or let me put it another way, did any of them remain in the bargaining unit?

- A. No. How could they remain in the bargaining unit if they weren't in the bargaining unit in the first place, so they all went back to their clerical jobs.

- Q. They were given no opportunity, some of those who were on production and maintenance jobs, to stay on them?

- A. No, sir, not to my recollection.

- Q. Let's look at the next column, "temporary replacement new employee." These are the people whom you stated were terminated within—well, when were they terminated?

- A. Within one week, approximately July 4, 1959.

- Q. Approximately July 4th?

- A. Yes, for all purposes that was their last date.

- Q. What happened when they were terminated? What happened to the jobs they were doing?

- A. Then the—

- Q. Were there calls, recalls from among the strikers to fill the jobs the temporary employees had been performing?

- A. Yes.

- Q. These were among the strikers who had remained on strike until the very end of the strike, is that correct?

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[428] A. That's right, and were not replaced on their jobs.

Q. Now the next column entitled "laid off employee permanent replacement." These are people who were on the seniority list as of March 31st who were out of the plant on lay off, is that correct?

A. That is correct.

Q. Now, I take it well, let's go on. "Returning strikers" now is the next column. This includes all persons who were in the bargaining unit and at work on March 31st?

A. That is correct.

Q. Who came back to work prior to the end of the strike, whether it was the beginning or towards the end but sometime prior to what date?

A. June 25th.

Q. Now were some of these returning strikers also considered as permanent replacements?

A. Yes, sir, they were.

Q. Can you describe to us how that happened?

A. Yes, sir, if a man was replaced on his job by either laid off employee or new hire and then came in himself to recover his own job and found he was replaced, he was then asked to fill out a statement of qualifications and availability and we then assigned him to any job opening we had that he was qualified for.

Q. And he was then a replacement?

[429] A. He then became a replacement for somebody else, if the job was in existence as of March 31st. If this was a new job that had been opened up, then the man did not become a replacement.

- Q. And in either case he got superseniority?
- A. That is correct.
- Q. I take it there were some instances in which some of these employees had been replaced themselves towards the beginning of the strike, employees came in towards the end of the strike and then they considered themselves as permanent replacements, is that correct?
- A. I don't follows that. You lost me with all of those replacements.
- Q. I take it that some—an employee, a returning striker could have been, and when I say could have been—such cases did happen—could have been replaced the early part of May, let's say, and then he came in the middle of June, let's say, he then became a permanent replacement on another job besides the one previously held?
- A. That's right.
- Q. Then such replacements happened, is that right? Can you tell us about how many of these there were?
- A. I would have to look through the record to check that for you, sir, because I can't tell you.
- Q. Employees who were replaced with superseniority—I take [430] it there were replaced employees on the list of one hundred twenty-nine, is that correct?
- A. That is correct.
- Q. Were there about twenty-five more?
- A. I would have to look at the record. I can't give you any accurate idea.
- Q. From your recollection, it was a substantial number—more than one or two?
- A. Yes, I would say more than one or two.

Raymond Bertone—Cross.

- Q. These employees now and let me say what I mean by these employes, those strikers who were replaced then came back at a subsequent date and replaced someone else?
- A. Yes.
- Q. And carried the seniority date as the date of their original hire, is that correct?
- A. That's correct.
- Q. The date previous to the strike?
- A. That's correct.
- Q. And they are given twenty years superseniority, in addition?
- A. In case of lay off, right.
- Q. In addition to their original date of hire?
- A. That is correct.
- Q. I would like you to take a look at respondent's exhibit 13. This shows the number in the bargaining unit, and [431] again let me ask you, when this says week of June 29th, does this mean beginning the week of June 29th?
- A. Yes, sir.
- Q. You have the calendar. Is that a Monday?
- A. Yes, Monday, June 29th.
- Q. This would be the week following then the last week shown on respondent's exhibit 12, is that correct?
- A. Yes.
- Q. And again this would be the number as of the end of that week, rather than as the date shown, is that correct?
- A. Yes, sir, that's right. Again, Mr. Davidson, I will have to say to you, you will have to advance this five days.

- Q. Five days?
- A. That's right, sir.
- Q. In terms of superseniority, or the twenty years additional seniority, the only number on this exhibit which is material is the number in the last column on the bargaining, is that correct?
- A. That's correct.
- Q. The non-bargaining people in various excluded categories, excluded under the terms of the certification?
- A. That is right.
- Q. Now I note in looking down the column of figures that in the period of June 29th, let's say, through July 27th, there was an increase in the total number of bargaining unit [432] employees from three hundred fifty-eight to three hundred sixty-two, that's a change of, if my arithmetic is correct, of four employees in the total number. I take it from your previous testimony with respect to the temporary employees that the identities of the employees included in this group of three hundred fifty-eight and three hundred sixty-two were changing during this period although the number remained close to constant, is that correct?
- A. So you understand the picture perfectly, the temporary replacements were not included in this figure.
- Q. They were not included in the figure three hundred and fifty-eight?
- A. No, because we didn't consider them active bargaining unit employees. They were just temporary employees.

Raymond Bertone—Cross.

- Q. Were they included in the non-bargaining unit employees?
- A. Neither one. They were just temporary employees.
- Q. Now you stated to me that as the temporary employees left you recalled bargaining unit employees, strikers who went out on March 31st, is that correct?
- A. I called them at the request of operation managers, what they needed to keep production going.
- Q. During this period of June 29th to July 27th, there were only four such employees called back?
- A. Yes, that could be possible.
- Q. It could be possible. Is it the case?
- [433] A. Yes, sir.
- Q. You handled recalls, didn't you?
- A. Yes.

Mr. Wayman: Let him finish his answer. I think he was about to explain something.

Trial Examiner: Go ahead.

The Witness: This figure we have, this total figure is when the temporary replacements were let go.

- Q. (*By Mr. Davidson*) They were already out?
- A. They were being let go.
- Q. And the three hundred fifty-eight would include the number of employees who had already been recalled?
- A. Yes, I am afraid it would be to make this figure correct. You are right.
- Q. About how many recalled employees would be in this? About a number equivalent to the temporary replacements that you had?

A. It depends, sir, on what the operation manager needed. Maybe we let fifty-seven TR's go and maybe only had a request to call back forty people.

Q. Those numbers are about average?

A. Yes.

Q. And the further fluctuations as these numbers increased represented the additional recall of strikers?

A. Yes, sir.

[434] Q. I take it—I won't take it; I will ask you. Among those employees who were recalled during this period, do you recall what seniority they had, what the cut off dates were for recall?

A. During the strike jobs were eliminated that strikers were on due to the changing completion of our production requirements. Some of these jobs were held by very high senior employees, '41, '42, '43 seniority, and those people whose jobs were eliminated were called back in that order, '41, '42, '43, '45 until we eventually got down to our lay off people.

Q. Can you remember what numbers actually were involved?

A. You mean numbers called back?

Q. No, what number of years of seniority?

A. When I say '41, I am talking about nineteen years, seventeen, sixteen, fifteen, down the line.

Q. That was during this period up to let's say July 27th when there was three hundred sixty-two people. It could even have gone lower?

A. No, sir, no, sir, because there is—I remember as of August, during the month of August, we still had people with approximately thirteen, fourteen years seniority that had not been called back yet.

Raymond Bertone—Cross.

Q. And those were recalled later?

A. Yes, as openings came up.

[435] Q. Now can you explain to us what the mechanics were when a new employee or striking employee or laid off employees came in during the strike and it was decided to put him on a job which had been previously manned by some other employee prior to the strike? How was it determined who he would replace?

A. By the junior one on the classification that was in existence, that people were classified on, as our classifications of March 31st.

Q. This was an instruction I take it which you gave to your various operating men?

A. That is correct.

Q. Did you check on that during the course of the strike from time to time to see this was being carried out?

A. Yes, sir, I did.

Q. When you compiled your list on June 25th did you discover any instances in which this had not been followed?

A. Not on June 25th, because I was in a hurry to get the list for the union.

Q. In checking later did you make corrections on the list?

A. Yes, sir.

Q. That you discovered in fact the wrong employee had been listed by an operation manager as replaced?

A. Yes.

Raymond Bertone—Cross.

- Q. Do you recall about how many corrections were made?
- A. Eight, about eight. I don't know—I may be off-- six [436] or eight.
- Q. Can you recall the identity of any individual at this point?
- A. Yes, I can. I know one good case.
- Q. You know one good case?
- A. Yes, because Mr. Bordonaro kept reminding me of it, after the strike was over.
- Q. Can you tell us about that?
- A. Yes, in the case of Peter Irene. Mr. Irene was classified as a plastic molder, as of March 31st. Mr. Irene at that time was our most senior operator in molding with approximately '41, '40 seniority, which is approximately nineteen years. On the list of June 26th when I gave it to the union I had Mr. Irene's name down. Mr. Bordonaro asked me to check this --I mean he believed there was some discrepancy. So I did check it and I found out through investigation that Mr. Bucceri who was then in Department 3 on job 547 had accepted a recall back to plastic molding to report April 1st, so as of April 1st Mr. Bucceri should have been on the plast molders list of job classifications, so as to be fair about this, and as far as I am concerned it was a very serious thing and I then took Mr. Irene off the list and submitted Mr. Bucceri because under our policy Mr. Bucceri should have been the man that should have been replaced.
- Q. So Mr. Bucceri was then listed as a replacement?
- [437] A. As a replacement, and Mr. Irene was taken off.

Raymond Bertone—Cross.

- Q. In correcting the other seven instances when you discovered the wrong employee was listed as replaced, what did you do?
- A. Either listed it as being wrongly replaced or just not being on the June 25th list.
- Q. As having been replaced?
- A. As having been replaced, correct.
- Q. What did you do? Did you then add them to the list?
- A. Yes, added, or if there were any to take off, I took off the man who was erroneously listed as replaced.
- Q. And you put another man in his place?
- A. Yes, sir.
- Q. Which was the first time you ever identified the other man, is that correct?
- A. How do you mean, sir? You mean when I asked to check?
- Q. The man who was added?
- A. Yes, sir.
- Q. One other question on mechanics as to how these things worked. I take it there was some job classification which you had prior to the beginning of the strike, five employees?
- A. Yes.
- Q. During the course of the strike you found it necessary to eliminate two of the jobs so there were three remaining?
- [438] A. That is correct.
- Q. And I believe this also actually happened—correct me if I am wrong—on such a case three employees came in who were qualified to do the job and were assigned to it, whom did they replace? The three junior employees on this classification?

- A. The three junior ones who were left after we reduced the operation. For example, if we had five people with seniority dates, '40, '42, '43, '46 and '47 in that order, if we decided we only needed three people and the two bottom people were no longer needed on that job.
- Q. And they were put on what?
- A. It isn't the idea put on. It just was eliminated. We only needed three for that operation. Now if a replacement came in to fill this requirement that we needed, then the third person on the list was replaced.
- Q. And the next replacement replaced the second person?
- A. That's right.
- Q. And the next one replaced the first?
- A. Yes.
- Q. So you didn't replace the three junior people on the job after March 31st, is that correct?
- A. In some cases—let me qualify that.
- Q. You can qualify it but you can answer my question first.
- A. We only did this if the person was previously classified [439] on the job when they came in. Let me explain what I mean. If a girl was on a certain job, the '47 girl, the '47 girl, the junior girl, her job was eliminated; we only needed three people so she came in during the strike, so would come back to her former job she had, but she then replaced the junior girl.
- Q. She was the junior girl, is that correct?
- A. No, she wasn't any more because we didn't need her on that job any more but if she came back to this

job, then she became the junior girl to replace the next junior girl on this classification.

- Q. Let me see if I can recap this now. The way you worked this was this. You had five jobs and you decided you only needed three.
- A. Right.
- Q. The bottom two people you didn't consider as being on this job?
- A. That's correct.
- Q. When the bottom two people came in they didn't go back to their old job. They replaced the two people senior to them, is that correct?
- A. If they went back to their former job, that is correct.
- Q. Mr. Bertone, would you be able to obtain for us the job classifications of job 529 and 530—let me ask you first do you have written classifications for these two jobs?

[440] A. Yes, we do.

Q. Can you obtain them for us?

A. I believe so.

Mr. Davidson: I would like to have the witness obtain them for our examination.

Mr. Wayman: That shouldn't be too difficult.

Trial Examiner: I am not going to delay any examination on this. We have all headed into this business of asking the witness to get something, dig up something else.

Mr. Davidson: I have no intention of delaying the hearing. Couldn't it be obtained?

Raymond Bertone—Cross.

Mr. Wayman: I don't think you can look at me and ask me that because I don't need them and I don't know what you intend to do with them.

Mr. Davidson: All I want to do is put them in evidence.

Mr. Wayman: You can't put them in evidence without asking the witness what they are, and giving him a chance to explain.

Mr. Davidson: May I examine them—

Trial Examiner: You can examine them if they are here.

Mr. Wayman: I have no objection to getting any facts that are material to this case into the record, but I don't want to delay the hearing. I think if these things were wanted, they should have been asked for before. I have no [441] objection to getting them but we can't put them in evidence just as pieces of paper.

Mr. Davidson: This witness has testified as to the contents of these two jobs and I think it becomes relevant at this point through his testimony—I think they are relevant to his testimony at this point. I think his testimony describes something which is an established written policy of the company, and I think an established written policy is better evidence and they will corroborate what the witness says.

Mr. Wayman: The request should have been made earlier. I don't object to any fact going into this record as long as it is relevant.

Raymond Bertone—Cross.

Trial Examiner: If you can get it, you might get it and give it to him but this thing now has just become chronic. Can you get this for me, and can you get that for me.

Mr. Wayman: Of course, we can but we don't have it here. You don't have it with you, do you, Mr. Bertone?

The Witness: No, sir, I don't.

Mr. Davidson: I have no desire to hold up the hearing. I would like to see it and I will fight the battle over, if necessary.

Trial Examiner: Go ahead. Continue with your examination.

Mr. Davidson: I believe that's all I have.

Trial Examiner: We will take a five minute break.

[442] (Recess.)

Trial Examiner: All right, the hearing will be in order. Go ahead, Mr. Fleischut.

- Q. (*By Mr. Fleischut*) I am referring to respondent's exhib 12, addressing myself to the clerical column. These one hundred forty clerical worked on bargaining or production and maintenance jobs during the strike, is that right?
- A. Yes, sir, they did.
- Q. And you cover the period of May and June but the strike actually commenced, of course, at midnight on March 31st, is that right?
- A. Yes.

Raymond Bertone—Cross.

- Q. Did they work in bargaining jobs about April 1st?
- A. Yes, sir, we all did for the whole month of April.
- Q. And you say none of these clerical employees remained in bargaining unit jobs after the strike, is that right?
- A. Not to my recollection.
- Q. Did you give them the opportunity to remain if they wanted?
- A. No, sir.
- Q. You didn't give them that choice?
- A. No.
- Q. They went back to their old jobs?
- A. They should have.
- Q. They didn't get any superseniority?
- A. No, sir.

[443] Q. I direct your attention to general counsel's exhibit number 32, the list of replaced employees and their replacements and I am directing your attention to those employees on that list who did not request reinstatement as the list is prepared?

- A. Yes, sir.
- Q. You have been present through most of the trial, have you not?
- A. Yes, sir, I have.
- Q. And you have heard the conversation the day concerning Wilford Hamm?
- A. Yes, sir.
- Q. Did you check to see if he had filed an application?
- A. Yes, we did, and we found one he had filed for reinstatement and it is in our file.
- Q. Do you know the date of that?
- A. I am sorry, Mr. Fleischut, I didn't check the date, but I confirmed he did file an application.

Raymond Bertone—Cross.

Mr. Wayman: I perhaps can help out. I looked at it and it was September 9th.

Q. (*By Mr. Fleischut*) And Danny Camino, did you check his?

A. Yes, but I did not find one for Danny Camino.

Q. Julia Sulkowski?

A. I checked and didn't find one for her either.

[444] Q. Rather than go through them name by name, I think there is approximately eighteen or twenty names who did not request reinstatement. Did you check the others?

A. No, I did not.

Q. You just checked those three?

A. That is right, that I was requested to do so.

Q. As far as you know, the others have not applied for reinstatement?

A. To my knowledge, yes.

Q. To this time?

A. As of this date, yes.

Q. Now directing your attention to the time when the strike is over, and you are now bringing on—bringing the replaced employees back to work, is that correct?

A. Yes, in seniority order.

Q. In the order of their seniority?

A. Right. Now Mr. Fleischut I want to qualify that. Those people who were brought in seniority order are those people whose jobs were not eliminated during the first week after the strike was over. After the strike was over many of the people who were out on strike came back to their jobs that they were not replaced on and were needed immediately so people

were called out of seniority order for those two weeks. I would say about two weeks. For example, in our pulse transformer department where we had experienced operators [445],—this is a very highly specialized product to make—we did have girls come back with '50 seniority because they were on that job when the strike commenced.

Q. What do you mean by '50 seniority?

A. I am sorry. Ten years seniority. I go by dates. What I mean is they were employed in 1950.

Q. Were they called in seniority order or out of seniority order?

A. Not for the first two weeks.

Q. After that you brought them back in seniority order?

A. Those whose jobs were eliminated during the strike, that is correct.

Q. Either during the first two weeks or after the first two weeks were over an employee came up for recall, his name came up?

A. Yes.

Q. And you had a job?

A. Yes.

Q. But his own job was gone?

A. Yes.

Q. You had other jobs?

A. Yes, requisitions from our operations manager.

Q. Would you then offer these people you were recalling jobs available when their old job was gone?

A. That's right, the senior one would be offered the first [446] opening, correct.

Q. But you took the twenty years seniority for those who had it into consideration in placing the people who did not have it after the strike, is that correct?

Raymond Bertone—Cross.

- A. No, the twenty years only applies on lay off. For all other purposes regular seniority rules, as far as job bidding or posting, reduction of force or what-have-you.
- Q. Well, an employee with ten years seniority—
A. You are talking about straight seniority?
- Q. You are calling him up, a striker you are calling him up to go to work?
- A. Right.
- Q. And he is qualified to do the job?
- A. Yes.
- Q. But somebody is in it for twenty years superseniority. You are not going to bump the man with superseniority, are you?
- A. No, sir, because the man is being called to an opening. It is not a reduction of force. This was not a bump. The man was being called back to an opening.
- Q. You only recall people to openings?
- A. That's right, that's all I could do under our procedure. I can only put a man on when I have an opening.
- Q. So let's suppose there is a job—
A. Right.
- [447] Q. And there is a man in the job with five years seniority.
A. Right.
- Q. And you recalling another man and he has ten years.
A. Right.
- Q. The man with ten years can't bump the man with five years, is that right?
- A. That's right, not on a recall from lay off.

- Q. You only recall to available jobs?
- A. That's right.
- Q. You don't recall and do a lot of bumping?
- A. No.
- Q. You recall only to openings?
- A. Right.
- Q. This is by contract, is that correct?
- A. Yes, sir. Mr. Fleischut, let me explain one thing, sir, the reason why a lot of these people were called back from the strike so readily is that as openings came up after the strike, they were posted in accordance with our contract.
- Q. The openings?
- A. Openings were posted.
- Q. And they could bid on the openings?
- A. Yes, they could bid but all the people we had in the plant with regular seniority had less than the people on lay off, so they were called back without any question. These people just couldn't bid. They didn't have the regular seniority [448] to bid for the job. That's why we had such a rapid return of the senior people from lay off.
- Q. Let me give you an example, a specific example, if I may. You recall you and I in my office one time talked about Mr. Robert D. Blunt, is that correct?
- A. Yes, sir.
- Q. He was a maintenance electrician. If you recall what was his status among maintenance electricians before the strike? Was he high or low?
- A. He was high. He was the only one in our plastics division.
- Q. He was the only maintenance electrician there?
- A. Right.

Raymond Bertone—Cross.

- Q. The strike was over and you called him up?
- A. Right, sir.
- Q. Why didn't he go back as a maintenance electrician?
- A. Because we no longer needed a maintenance electrician in the plastics division.
- Q. For economic reasons there was no job opening?
- A. His job was eliminated.
- Q. Were there job openings in other departments for maintenance electricians?
- A. Yes, there was and I called him back.
- Q. For maintenance electricians in other departments?
- A. No, sir.

[449] Q So there was just no job for a maintenance electrician available for him?

- A. That's correct.
- Q. So you offered him another job?
- A. That's right.
- Q. But you could only offer him jobs that were not filled is that correct?
- A. That's correct, whatever we needed.
- Q. And it didn't matter whether the persons that filled those jobs had one day's seniority or a hundred years seniority, he couldn't bump in on them, could he?
- A. Not unless he was reduced, sir.
- Q. You know what I mean when I use the word bumping?
- A. Yes.
- Q. In other words, he hasn't got any claim in this case because superseniority had nothing to do with his ability to take the job?
- A. That is correct.

Raymond Bertone-Cross.

- Q. You told these people their jobs wouldn't end when the strike was settled?
- A. That's correct, they would not be laid off or discharged.
- Q. That question was a little out of context. Let me start from the beginning. When you—did you discuss this with the people when they actually came to work, is that correct, or when you interviewed the replacements?
- [450] A. I told them, sir, if I accepted them as an employee.
- Q. You accepted them as an employee. Now you are an employee.
- A. Yes.
- Q. Now you told them "your job will not end when the strike is settled"?
- A. I didn't say their job would not end. I said they would not be laid off or discharged.
- Q. When the strike was settled?
- A. That's right.

Mr. Fleischut: Nothing further.

Mr. Wayman: I have just about two questions, if the trial examiner please.

Trial Examiner: All right.

Mr. Wayman: In response to the last question as to what you told people when you interviewed or hired them, it is my recollection you did not say this to temporary employees?

- A. That is correct, they were not told that. What they were told their status would be temporary. They

Raymond Bertone—Cross.

may work five minutes, or they may work—we don't know. It was indefinite.

Mr. Wayman: You did tell the permanent people such?

The Witness: That they would not be laid off, yes.

Mr. Wayman: What was the source of these temporary replacements?

The Witness: College students.

Mr. Wayman: Did you yourself do any production work [451] during the strike?

The Witness: Yes, sir, I did.

Mr. Wayman: What did you do?

The Witness: Molding press, ran the molding press, and did finishing operations in plastics.

Mr. Wayman: I have no more questions.

Trial Examiner: All right, you may step down.

Mr. Davidson: Just a minute, there is one thing that has been raised by Mr. Wayman's last few questions. Mr. Bertone, do you remember the three people as to whom there were stipulations yesterday?

The Witness: Yes, I do.

Mr. Davidson: And you testified earlier as to Hamm, Hugh Nelson, Carol Ripley and Jean Good, I believe. One of those three left in September to return to school?

Lewis J. Shiolen—Direct.

The Witness: According to her personal history card, yes.

Mr. Davidson: Was she also a college student?

The Witness: Again, as I said, Mr. Sparks my associate helped me interview these people. I probably didn't see the application. Whether she was or not I don't know.

[454] LEWIS J. SHIOLENO, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: Will you state your name for the record?

The Witness: My name is Lewis J. Shiolen.

Trial Examiner: Where do you live, Mr. Shiolen?

The Witness: I live at 1414 West 43rd Street, in Erie, Pennsylvania.

DIRECT EXAMINATION

- Q. (By Mr. Wayman) What is your job, Mr. Shiolen?
 A. I am general manager of the Erie Electronic Division which is on West Twelfth Street, in Erie, Pennsylvania, and I have been doing this for about two and a half years.
- Q. You were the general manager of this division during the strike of 1959?
- A. Yes, I was.

Lewis J. Shiolen—Direct.

- Q. Will you tell us briefly the duties of general manager in this division?
- A. A general manager in this division is responsible for product development which is a phase of engineering, product testing, product sales, services, service functions which are quality control, order writing, customer service, shipping and receiving, what-have-you, billing, maintenance, building [455] maintenance, building construction, manufacturing, industrial services, and the responsibility for accounting and personnel morale within the plant.
- Q. Can you tell us the nature of the business of the Erie Electronics Division?
- A. The term Erie Electronics—of course, Erie is related to the Erie Resistor Corporation. The electronic components is an accepted term in the industry which means any part that goes together in another system using electrical energy as a source. This would be a computer, a guiding system, what-have-you. However the type of components Erie Electronic manufactures are the small devices which are—which go into the black boxes that go into the black boxes, et cetera, minute components which you can put in your hand, as compared to a locomotive or anything like that.

Mr. Wayman: I am going to offer in evidence—

Mr. Davidson: I object.

Trial Examiner: Let counsel finish. Go ahead.

Mr. Wayman: I ask this box be marked respondent's exhibit 14.

(Thereupon, a box was marked Respondent's exhibit 14, for identification.)

Lewis J. Shiolen—Direct.

- Q. (*By Mr. Wayman*)—Mr. Shiolen, I show you a plastic box which has been marked for identification, as Respondent's exhibit 14, and ask you what that is?
- [456] A. This is referred to as a sample kit which represents one hundred and three variations of the components we manufacture for the various industries we serve. Actually there are some twelve thousand variations of these one hundred three variations.
- Q. These are the products, or example of the products you manufacture in the division itself?
- A. Yes.

Mr. Davidson: I object. I would like to know the relevancy of this line of questioning.

Mr. Wayman: We intend to show the nature of this business and the necessity for keeping the plant open and the necessity for having people make these parts. It is certainly relevant.

Trial Examiner: Go ahead. I will consider this as preliminary.

Mr. Wayman: I will offer respondent's 14.

Trial Examiner: Is there an objection?

Mr. Davidson: I object on the grounds of relevancy. This is something we can assume this company is in business to make products and to make money and to serve other people. This is what most businesses exist for. I don't see there is any special factor in this which has anything to do with this case, and the issues in it.

Mr. Wayman: Perhaps if we were to go ahead with our [457] questions it would be relevant.

Lewis J. Shiolen—Direct.

Trial Examiner: I will receive this sample kit in evidence as respondent's exhibit 14.

(The box heretofore marked as Respondent's exhibit 14, for identification, was received in evidence.)

- Q. (By Mr. Wayman) Will you tell us who are your competitors in this business?
- A. The components which I refer to as electronics which we manufacture, we have approximately fifty competitors in the United States alone and some of these are Sprague Electric, High Q Division of Varivox, Tetra System, Mada Radio Materials, Radio Industries, Speer Carbon, Central Lab Division of Globe—

Trial Examiner: I think that's enough. We can't go through the whole fifty.

The Witness: This covers the basic domestic competition, and then we have a serious competition from the foreign imports, particularly Japan which are many and often cheap.

- Q. (By Mr. Wayman) How are most orders for these components placed?
- A. The ordering process actually takes place in about four different mediums and the primary one is telephone. The customer will call up and ask for delivery of a given order [458] within a matter of days and then if we can't supply they can, of course, go to fifty of the other competitors; by direct sales, and by TWX Western Union and by letter, but primarily forty per cent of the orders are received by telephone from our customers.

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- Q. Does delivery date play an important part in the placing and retention of orders?
- A. Delivery problem is one of the most serious ones we have on the basis there are so many competitors and the type and variety of products we are not able to perform a store house for this type of thing. We manufacture it from the beginning and as such we have to be able to deliver within a matter of days and not weeks, as such.
- Q. Will you tell me whether or not you prepare a forecast of sales periodically?
- A. Yes, sir. I, in conjunction with the general sales manager, who works directly with me and the vice president in charge of marketing set down about three months before the end of the year and prepare a forecast for the coming year.
- Q. Did you make such a forecast for the year 1959?
- A. Yes, we did.

Mr. Wayman: I am going to ask these papers be marked respondent's exhibit 15.

(Thereupon, documents were marked Respondent's exhibit 15, for identification.)

- [459] Q. (*By Mr. Wayman*) Mr. Shiolen, I will show you a document marked for identification respondent's exhibit 15 and ask you what that is?
- A. This is the forecast of each of the major product lines within the division by accounting periods, by product breakdown, by pieces and by dollars.
- Q. When did you prepare this forecast?
- A. This particular one is a revised forecast of the original one for 1959. We had originally prepared one in October and November, towards the beginning of

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November, 1958, and then we were required to revise this particular forecast after the first quarter of 1959.

- Q. Will you tell us briefly what this forecast represents, what are you forecasting?
- A. These are forecasting our share of the market which is available for the technical components that we manufacture. To the best of our ability and our historical information and contact with the various purchasing people.
- Q. This is the business you expect to get?
- A. Yes.
- Q. This is not orders already on your books?
- A. No, sir.

Mr. Wayman: I offer respondent's exhibit 15.

Mr. Davidson: I object to it. This is conjectural, self-serving and if we went into this thing to determine how [460] it was made up, we would spend days investigating it. I don't think this has any probative value in this case.

Trial Examiner: I think it may be received in evidence for what the witness has identified it as, as a forecast of sales for 1959. To that extent I think it may be received in evidence. Overruled.

Mr. Fleischut: No objection, subject to relevancy.

Mr. Davidson: I have a continuing objection.

Trial Examiner: It is received.

(The documents heretofore marked Respondent's exhibit 15, for identification, were received in evidence.)

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Mr. Wayman: Will the reporter please mark this document as exhibit 16.

(Thereupon, a document was marked Respondent's exhibit 16, for identification.)

- Q. (By Mr. Wayman) Mr. Shiolen, I show you a document marked for identification respondent's exhibit 16 and ask you what that is?
- A. This is a similar form referred to as our 1960 forecast which was prepared by the same three people I mentioned before in December of 1959.

Mr. Wayman: I offer respondent's exhibit 16.

Mr. Davidson: The same objection.

Trial Examiner: I don't know where 1960 would be material.

[461] *Mr. Wayman:* It has a tendency to show how the forecast is borne out in normal periods. It is not essential to our case. The 1959 forecast is.

Trial Examiner: I can't see where the forecast for 1960 would be material. I am going to reject the exhibit.

(The document heretofore marked Respondent's exhibit 16, for identification, was rejected.)

- Q. (By Mr. Wayman) Now, Mr. Shiolen, do you recall the strike of 1959?
- A. Yes, sir.
- Q. Did the Erie Electronics Division operate during that strike?
- A. Yes, it did.

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- Q. As of March 31, 1959, did you have a backlog of orders for these parts?
- A. We had a higher than average backlog of orders at that time.
- Q. Did you have any raw materials or parts in the plant to make these?
- A. Yes, we did.
- Q. Did you have any substantial inventory—I think you have said you didn't stock finished parts and you didn't ship from stock.
- A. We had what is commonly referred to as in-process inventory, which is a normal inventory from operation to [462] operation in order to keep going, but we did not stock finished items as such.
- Q. About how long does it take to process an order through that plant under normal conditions?
- A. The average order cycle from the time we get the order until the time it is shipped, is about fifteen days, and this would have to be construed as fifteen working days and not calendar days.
- Q. Were any of the orders cancelled during the strike?
- A. Yes, they were.
- Q. Can you think of any particular order that was cancelled?
- A. The most significant one was by the Philco Corporation which is one of our top customers, as such, and they called up the very next day and cancelled all open orders.
- Q. The very next day after what?
- A. After the strike was in effect, which was April 1st.
- Q. Did your plant Erie Resistor, Erie Electronics Division, produce any materials during the strike, any finished product?
- A. Yes, we did.

- Q. Did you ship anything?
- A. Yes, we did.
- Q. Do you make a record of your shipments, a running record?
- A. Yes, sir, always.

Mr. Wayman: I will ask these charts be marked respondent's exhibit 17.

[463] (Thereupon, a document was marked Respondent's exhibit 17, for identification.)

- Q. (*By Mr. Wayman*) Mr. Shioleno, I show you a set of three charts which have been marked for identification, as respondent's exhibit 17, and ask you what they are?
- A. This is what we refer to as a control chart on shipments using dollars as one control and weeks of the year as the other in comparison to the actual forecast which we had made at some previous time. The first chart is the actual result of the 1958 year. The second one is of 1959 and finally 1960.
- Q. I notice there are thirteen blocks or squares. What do they represent?
- A. The thirteen divisions of the Erie Resistor Corporation financial break down of periods where the average method is to use months, we use periods which there are four equal weeks in each one, four seven days weeks, thus giving us an easy reference of one year to another.
- Q. I notice you have filled in with green pencil apparently three of the numbered accounting periods on the chart for 1959.
- A. That's right. Those are the accounting periods in which the strike was in effect.

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- Q. What are the blue lines on this chart?
- A. The blue lines were the forecast.
- Q. What are the red lines?
- [464] A. The red lines are the actual shipments during those periods of time.
- Q. What are the black lines?
- A. The black line with the actual by week, and the red line was the average of the four black dots during that particular period.
- Q. These represent actual shipments?
- A. Yes, sir.
- Q. So by reference to this chart we can tell the relative number of shipments, orders, and anticipated orders during any of these accounting periods?
- A. Yes, sir.

Mr. Wayman: I offer respondent's exhibit 17.

Mr. Fleischut: Objection as to relevancy.

Mr. Wayman: Let me say this—perhaps I should wait and see what Mr. Davidson has to say.

Mr. Davidson: I still fail to see relevancy to this whole line. I have got a continuing objection on this. I renew that.

Mr. Wayman: One of the things the Board pretty often criticizes employers for doing in cases like this is not showing it was economically necessary for them to operate their plants during the strike. It was economically necessary for us to operate our plant during the strike and this is the witness here who can testify to the proposition.

- [465] *Trial Examiner:* I will over ruled the objections and the chart may be—

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Mr. Davidson: In my brief I would like to answer that.

Trial Examiner: I don't want that. I was prepared to rule on that before Mr. Wayman started, so it won't be necessary to answer. I will over rule the objection and the chart may be received in evidence as respondent's exhibit 17.

(The document heretofore marked Respondent's exhibit 17, for identification, was received in evidence.)

Q. (*By Mr. Wayman*) I will ask the witness directly. Was it necessary for you to operate the plant during the strike?

A. It absolutely was.

Mr. Davidson: I object. That's what he is trying to prove and he is asking this witness now what he is trying to prove.

Trial Examiner: He is trying to satisfy you. Over ruled. It may stand.

Q. (*By Mr. Wayman*) Have you finished?

A. No, I hadn't really finished. They said something and threw the whole thing off.

Trial Examiner: I think he finished. He said it was necessary to operate the plant and that answers the question.

Q. (*By Mr. Wayman*) I will ask you to give us the reasons on which you base that statement.

[466] *Mr. Davidson:* I object.

Trial Examiner: I think we were at the point where they had a backlog and they had materials,

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and Philco cancelled an order. Do you want to carry on from there?

Mr. Wayman: Yes, I would.

Trial Examiner: All right. You had a backlog of orders. What did you do? Process those orders?

The Witness: We weren't able to.

Q. (*By Mr. Wayman*) Why not?

A. We weren't able to process this large backlog of orders within the time required by the customers due to the limited number of people we had available to run the equipment, but the major portion is here it took about two and a half years to get approved at most of the customers for our components. In recent years all of the customers have introduced what is commonly referred to as data processing for ordering and as such most of them have limited the number of sources such as ourselves to three. We took about a year and a half to get most of these people's list and if you couldn't supply the materials we would then be dropped off and this would have a drastic effect upon our future business.

Q. Did you have any phone complaints from customers during this period about not receiving products?

A. Very definitely. I did and about seven other people.

Q. Who did the production work in the plant during the [467] first month, the month of April?

A. It would be in the general category of salaried personnel, clerical, engineers, management—you name it. Anybody that wasn't in the bargaining unit.

- Q. Were you able to get your production out with these people?
- A. We were able to get a portion of it out, not to satisfy the customers but to get a portion.
- Q. Using the pre-strike level of operations as one hundred percent, can you express the amount of production you were able to get in April in percentage?
- A. It was in the area of thirty percent.
- Q. Who did the production work during the month of May?
- A. For the first week or so it continued to be this same group of salary and clerical people, and sometime around the week of May 11th we started to get replacements into the factory for the previous employees, and as such we were able to get some more production out.
- Q. Can you express this production in the month of May in terms of percentages?
- A. The first two weeks of May it remained approximately the same level but the last part of May we were able to get up to forty percent of the pre-strike level.
- Q. During the month of June did you get any production?
- A. Yes, things were able—we were able to produce [468] larger quantities and by the end of June, which the reference would be sometime during the week of June 22nd, from there on, we were able to get as high as seventy-five percent of our production back up.
- Q. Just before the end of the strike?
- A. Yes.

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- Q. Did you receive any new orders during the course of the strike?
- A. Yes, sir.
- Q. Again referring to the pre-strike level can you express the amount of new orders received during the strike in terms of percentage?
- A. In relations to the level we had obtained, it would be about seventy percent.
- Q. Now, Mr. Shioleno, as general manager of the electronics division did you participate in the policy meetings held by management during the strike?
- A. Yes, I did.
- Q. Did you participate in negotiations?
- A. Yes, I did.
- Q. Did you participate in the decision to have permanent replacements?
- A. Yes, I did.
- Q. Will you tell us in your own words when this decision was made and under what circumstances and who was there and [469] so on?
- A. Yes, sir. After attempting to run the plant during the month of April at this low level it had made it very difficult for us to maintain any type of customer satisfaction which is one of our primary responsibilities and as such as general manager it was my responsibility to go back to management and request some decisions be made here to get the plant in full production. The partial production work just was not satisfactory to continue at this pace. Towards the end of April we had set down and talked this thing over and when I say we I am implying Mr. Ferrell, Mr. Schau, Mr. George Fryling.
- Q. We know who Mr. Ferrell is and who is Mr. Schau?
- A. He is general manager of the plastics division.

Q. And you say Mr. George Fryling?

A. Mr. George Fryling, the vice president in charge of operation, and G. Richard Fryling, the president, and Mr. Shenk, vice president in charge of sales, and Mr. Heibel, vice president in charge of planning, and Mr. Minnium, vice president in charge of engineering. There may have been a couple of others. I am not sure, but our problem here was try to determine a method of getting the plant back to full production and as such we exhausted any other ideas we might have had and embarked upon a plan of replacements. At that time Mr. Murphy was there and reminded us the plan [470] of replacements meant that we were going to be doing certain things that would eliminate people's jobs if this policy was put in. We became very aware of this and as a result we actually thought about this for several days and finally we composed a letter—in the event we decided to go ahead with the plan, we would send this letter out on May 3rd. To my recollection, we had a meeting on Sunday evening—about eight o'clock we were scheduled to be there, and we sat around the room for another couple of hours.

Q. When was this?

A. On Sunday, May 3rd 1959, to decide whether we embark upon this program of replacements or don't we, because it was a very serious decision. It meant people were going to be permanently replaced in jobs who had previously worked for the Erie Resistor Corporation for many years, and it was a difficult problem as far as making a decision along this line. Finally with no other recourse, we embarked upon this by mailing the letter that evening, and I

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think we received applications from the people on the 4th of May.

Q. Tell us whether or not you participated in the decision to establish the so-called twenty year seniority policy?

A. Yes, I participated in this.

Q. Will you tell us when and under what circumstances this decision was reached?

A. Well, there were circumstances that led up to that particular decision in the fact that when we embarked upon [471] this replacement plan we weren't able to get the people in the plant required to bring it back to full production. There were some occurrences during the month—excuse me—during the week of May 3rd through May 8th which reflected on our ability to bring people in, and finally on May 11th we were able to get one or two in, or whatever the case may be. However, that week it was still at a very slow pace. It was just impossible to get anybody to cross the lines and to come to work under any conditions. We realized back on the 3rd this was going to be a definite problem and we were discussing this on the 3rd and means of insuring people jobs who did come to work. We were—myself, I had been involved in management for a few years and Mr. Schau general manager of the plastic division for quite a few years and we were very familiar with our stringent seniority clauses, the union shop clauses in our contract, and as such would not be able to assure these people jobs unless we were to provide some mechanics to insure them that they would not lose the job at the end of any settlement of the strike itself.

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- Q. All right, now I suppose this decision was reached in some sort of meeting?
- A. Yes, there were many meetings before, between the week of May 11th and the end when we had toyed with many ideas of separate lists, a seniority list equal to the union officers, and all types of things like this. Finally we arrived at [472] the idea if we were able to use the twenty year addative to any one who would come to work under these conditions this would provide them with enough service to work for some period of time. As mentioned before, the forecast was so determined, you could interpret those backwards to determine how many people would probably working at the end of the year, and as such we used this as a guide to determine what number of years would be necessary in order to keep these people and give them job assurances. The meeting actually took place in Mr. Ferrell's office with Mr. Murphy and Mr. Schau and myself and we toyed around with that for quite a while and finally reduced it to writing and when we went to negotiations I believe the 28th we mentioned it. We did not give them a piece of paper but we mentioned it to the union's negotiation committee at that time, seeing we were not able to arrive at any other method of insuring jobs that we would use—we would then propose this twenty year addative plan, and we would use it.

Mr. Fleischut: I object to this entire answer. It is merely a self-serving declaration and of no probative value.

Trial Examiner: Well, again, this is something that was discussed by management representatives

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as the reason for putting in the twenty year plan. Let me ask you this. Did you mention any of these reasons that you have outlined [473] here to the union committee?

The Witness: Yes.

Trial Examiner: At the meeting of May 28th?

The Witness: I couldn't state positively that day but on many occasions that they—probably some at that time. I was not the official company spokesman but a lot of times I would add comments as to the reasons for this.

Trial Examiner: I will over rule the objection and the answer may stand. Go ahead, Mr. Wayman.

Q. (By Mr. Wayman) Now, Mr Shiolen, did you on any occasion tell the employees, production and maintenance and other employees in the electronics division, about this decision?

A. Yes, sir, it was my personal policy throughout the strike to hold daily meetings—this is from the beginning on, to keep everybody inside the plant as well aware of the conditions of negotiations and the problems we may have, as well as the most important problem, to keep the morale up on a daily basis, in order to keep them coming back to work and right after the first replacements came in the plant, which was in the week of May 11th I in one of my talks definitely said there would be some means of job assurance, that you would not lose your job as a result of the settlement of the strike and there would be a plan instituted that would guarantee this as such, and then after we had presented this idea to

the [474] union, the negotiating team, I think again the date is May 28th, that following week I then told the entire group, the working group in the electronics division that we were not able to come to an agreement in negotiations on this and as such we were going to go ahead with this twenty year plan, we were going to use it and that was the way it was going to work. This was—however I did add—I want to add to that—however, if there is a plan which is equal to or better than that could be agreed upon in negotiations we were certainly open to anything of this nature. It wasn't until the notice was actually posted on the 15th of June, I then got up before this posting—Mr. Schau was there and Mr. Ferrell was there—and I got up in front of the group and stipulated to them this was the policy we were going to use. I explained it again and for their further communication there would be a notice of it on the bulletin board but at this meeting they would have the privilege of looking at it and any questions I would be glad to answer.

Q. Mr. Shiolen, I would like you to look at charging party's exhibits 1 through 3. Will you refer to those exhibits please?

A. Yes, sir.

Q. Do you recognize that form?

A. Yes, sir.

Q. Can you tell us what it is?

[475] A. This is a pink form designed by Mr. Murphy and Mr. Ferrell and myself as resignation form to go along with the maintenance of membership clause that we had tentatively agreed upon in the negotiations. This particular form was designed on

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June 25th to the best of my recollection in Mr. Ferrell's office. However, we did not—we were not able to formalize it until the 29th or so of June, where we then had it printed. This was printed in our own print shop.

- Q. What did you do with this form?
- A. We held it back after it was printed until I could conduct another meeting inside the plant to explain the use of it, what it meant and the maintenance of membership clause in the contract meant. At this time I got before them and I held up blank cards—there was another part on here, the resignation card, that green card commonly referred to as check off of dues, and a white card which is commonly recognized as joining the union. I got before the group and explained the three of them.
- Q. Approximately what day was this?
- A. This was on June 30th to the best of my recollection.
- Q. All right.
- A. I got before the group and I suggested here are three mediums, the green one and white one actually go together. If you join the union, you must sign a check off of dues under section 3 of the contract. I said it is your personal [476] responsibility to make a decision whether you would like to belong to the union, or you would like not to belong to the union. I said the pink card is available and if you would like to resign, and as such if you would like to join the white card is available. I also stipulated every foreman and operation manager would have these on his desk and you can get the same by going to that particular desk.

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- Q. Now to the best of your recollection, you say this was about the 30th of June?
- A. Yes, sir.
- Q. Were the cards then made available immediately?
- A. Yes, sir.
- Q. Mr. Shiolen, during the period of the strike did you receive any complaints from employees who were working about difficulties encountered in crossing the picket line, through threats, damage to their homes?
- A. Yes, sir, as I said before—

Mr. Davidson: Sam objection to this.

Mr. Fleischut: Yes, I object.

Trial Examiner: I am not going to go into this matter of violence. I am going to sustain the objection. You may make an offer of proof.

Mr. Wayman: I simply offer to prove by the witness—

Trial Examiner: You don't have to make the offer right at this minute. You can wait until later, if you like.

[477] *Mr. Wayman:* I may wait until later. I will wait until later. I have no further questions on direct of Mr. Shiolen.

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CROSS EXAMINATION

- Q. (By Mr. Fleischut) Mr. Shiolen, on or about June 30th when you told the employees they could drop out of the union, did you tell them they were going to have a maintenance of membership shop?
- A. Yes, sir.
- Q. Now the red cards available to the employees to withdraw from the union, the cards charging party exhibit 1 through 4.
- A. That's right.
- Q. Is there not a perforated edge there and another section that is missing?
- A. Perforated?
- Q. Is that just half of the card?
- A. Yes, as I mentioned there is only half here.
- Q. What did they do with the other half?
- A. It goes to the payroll department as far as I can understand.
- Q. To the company?
- A. Yes, in order to reconcile the fact they had originally signed a check off card.
- Q. So the company would know who withdrew from the union?
- A. No, sir.
- Q. What?
- [478] A. No, the statement you asked me so the company would know the withdrew from the union, and the answer was no it was not. It was for a "reduction" in pay.

Mr. Wayman: Deduction, I think you mean.

The Witness: Deduction, excuse me.

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Mr. Fleischut: Nothing further.

Trial Examiner: Do you have any questions?

Davidson: Yes.

- Q. (*By Mr. Davidson*) Mr. Shioleno, can you give us an approximate break down by percentages of the number of orders which came in with respect to the telephone, salesmen, TWX and letters?
- A. Yes, about thirty to thirty-five percent and sometimes forty by telephone, but let me expand upon this to the extent the sales people themselves also telephone in, so the category of sales people and direct telephone calls would amount to fifty percent of the orders; TWX about ten and then the mail would be anywhere from thirty to forty. These are rough categories.
- Q. Not every telephone order, I take it, is rush?
- A. Every telephone call, every order is rush?
- Q. Not every one?
- A. The greater percentage of telephone calls are urgent, which means they want the orders in a matter of one week, two weeks at the outside.
- [479] Q. Your customers, I take it, use the telephone by habit?
- A. No, sir. You don't add extra cost for the sake of adding extra cost.
- Q. How about your sales group?
- A. No, sir, we have a direct mail system, with the sales people, where we receive a batch of mail every Monday and if the order is urgent—if it isn't that urgent, they send it in by mail.

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- Q. When was the last strike which affected the operations at this plant?
- A. The last one?
- Q. Yes.
- A. To the best of my recollection it was 1957.
- Q. How long did that last?
- A. I don't know. A week—a few days. I don't know.
- Q. Not over a week?
- A. I really couldn't say, honestly, but it was not thirteen weeks, that's for sure.
- Q. Was it one week?
- A. I could not say that.
- Q. Could it have been just one day?
- A. No, it was more than one day.
- Q. Now in the discussions to which you refer, or in which the twenty year policy was arrived at—you stated you were involved in this discussion and you were familiar with the [480]. seniority shop clause, the union shop clause.
- A. Yes.
- Q. Can you tell me the relationship the union shop clause had to this discussion?
- A. Yes, the union shop clause implied everybody in the plant had to belong to the union, and as such they were all members of the bargaining unit as a means of employment, point one. Point two, because they were employed here we must follow the contract along these lines as far as the movement of people in line with their seniority, meaning the senior people are always working and the junior person is on lay off.

- Q. Now would you answer for me again what was the relationship between the shop clause to the discussion of twenty years seniority.
- A. I just feel it tied in, just like the other sixty-three sections are.
- Q. You felt because there was a union shop clause in the contract it was necessary to make some provision similar to the twenty years?
- A. Because of it specifically?
- Q. This and other things.
- A. Not because of the clause, specifically, no.
- Q. What relationship did it have?
- A. Just the related combination of facts.
- Q. That related to the twenty years?
- [481] A. Not related to the twenty years—related to the fact we had a seniority plan we had to follow.
- Q. Related to the seniority plan you had to follow?
- A. Yes.
- Q. What was that relationship?
- A. Just normal bargaining responsibility respecting the contract.
- Q. Now what did you say when you were discussing this? Can you remember what you said about the union shop clause?
- A. No, sir.

Trial Examiner: You mean with the union committee?

Mr. Davidson: No, he testified—

Trial Examiner: No, I know he testified quite some time as to the discussion among the officials.

Mr. Davidson: That's right.

Trial Examiner: All right, let that stand and let's move into something else.

Q. (*By Mr. Davidson*) Did you discuss these reasons with the union?

A. On occasion.

Q. Do you remember what you said to them and when and to whom?

A. I can't remember specific dates or times but I remember discussions at some of the side-bar conferences with Angelo Colella.

[482] Q. What did you say?

A. To the best of my recollection, without giving it word for word, it was something of this nature. Angelo mentioned to me "Are you having any trouble getting any people across the line," and I said "Yes, we can't get them across the line," or maybe the words were to this effect—I am trying to recall the situation and not a specific quotation—the theory was "How many people have you got across the line," and my answer would always be "Not very many; we don't seem to be able to get them across the line unless we give them some kind of a job assurance."

Q. This was your discussion?

A. This was a reference.

Q. With Mr. Colella at what time?

A. I don't know.

Q. At a side-bar conference?

A. At a side-bar and some across the table conversations.

Q. You don't remember when?

A. No. It was after May 11th, I know that.

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Q. These were the reasons you gave?

A. Yes.

Q. You did not personally participate in the hiring of any of the replacements, did you?

A. Are you speaking of the interviewing?

Q. The interviewing and the acceptance.

[483] A. Of the acceptance—there are two categories of acceptance. One is acceptance at the interviewing time, and one is acceptance at the time the person comes to work. When the person came to work, yes, I was there.

Q. You interviewed him?

A. I talked to him.

Q. Did you discuss with him this assurance?

A. Yes, sir.

Q. Before he was hired?

A. I said acceptance at the plant when they came to work. He had been accepted by the personnel department.

Q. He was already an employee?

A. Yes.

Q. When did you have this conversation or meeting in the shop at which you testified you told people in the plant that it might not be twenty years—that it would be a plan equal to it, or better? Do you remember that?

A. The week of June 2nd, 3rd, 4th—in there. I had a daily meeting with these people.

Q. During this period of June—

A. I had daily meetings from April 3rd all of the way through until—I think we still have them.

Q. These meetings were directed at the employees?

A. Yes, sir.

- Q. Now you referred to a speech at one of these meetings [484] in which you discussed this withdrawal card from the union.
- A. Yes.
- Q. What else did you talk about in this speech to the employees?
- A. On June 30th.
- Q. Whatever day it was?
- A. This is the date I discussed this. The main point was to discuss the movement of the people that was going to be occurring in the next few weeks and on top of that we had some fifty-five or sixty temporary employees who were college graduates and they had to be informed in the next few days they were going to be released because they were temporary. As far as the rest of the people, we had to have them understand what the maintenance of membership clause was, how it worked.
- Q. What did you tell them?
- A. We told them anybody here who would like to remain a member of the union has this prerogative; anybody would like to resign from the bargaining unit has this prerogative. It was their own personal decision at any times. Cards are available to transact either action.
- Q. And these cards, as I understand it, the withdrawal cards, was physically attached to the revocation and check off of dues, is that correct?
- A. No, there were three separate cards. The withdrawal [485] card is a pink card referred to here which had another section on it which was sent to our payroll for reason of stopping the deduction of union dues.

b *Lewis J. Shioleno—Cross.*

- Q. That's right, those two cards were physically attached?
- A. Yes, it was a perforated pink card.
- Q. Did you explain to people they could fill out one of them and not the other?
- A. Not to my recollection.
- Q. This talk I take it to employees was during working hours?
- A. Definitely.
- Q. And they were paid for this time?
- A. Yes, sir.
- Q. Was this at a meeting or at their machines?
- A. No, we gathered for meetings every day, usually in the production control office.
- Q. Now in the course of the meeting, did you also talk to the employees about what would happen if no contract was signed?
- A. I may have but not to my knowledge. I can't recall anything like that. Are you speaking about no contract, when? Any time? At this particular meeting?
- Q. Either June 30th, July 1st or 2nd?
- A. I don't recall that.
- Q. Was there only one such meeting at which you spoke to the employees?
- [486] A. There must have been a hundred of them.
- Q. At which you mentioned the withdrawal card?
- A. Only one at which I mentioned the withdrawal card.
- Q. You recall in the course of this meeting telling people so far as their benefits were concerned, it made no difference whether or not they signed a card?
- A. Definitely. This was always a point. There were absolutely no changes on any of the things, any of the

practices whatsoever that the management of the division had ever practiced.

Q. Did you also give them assurance at the same time, even if no contract was signed they would continue to have these benefits?

A. I don't recall that but the implication was there.

Q. How was the implication there?

A. From the day one throughout every meeting I conducted, we always professed we would not change any of our standards, meaning work practices at any time, any of our benefits, plans, whatsoever, regardless of anything.

Q. Whether or not a contract was signed, is that correct?

A. Well, now, this is not true. If the contract itself so stipulated that we change one of these, then we would have to follow the contract, yes.

Q. But if no contract was signed the benefits would continue?

A. Yes.

[487] Q. You made this assurance on the morning when you told them about the cards?

A. I will not say specifically on that date. One of the many meetings, yes.

Q. Did you ever invite a union representative to attend any of these meetings of the employees in the plant?

A. I don't really know.

Q. You conducted the meetings?

A. I think we did one time. I mentioned to somebody and I said "Why don't you come to the meeting if you want to hear what it's all about." This was during the negotiations and the guy said "How do you

George Schau—Direct.

get in?" And I said "Cross the picket line," and he said "You think I'm crazy."

- Q. Who?
- A. I don't remember. It could have been anyone of the negotiating team, but I don't know.
- Q. You are familiar with all of them?
- A. I am familiar with faces.
- Q. Do you remember when this happened?
- A. No, but I was being constantly—I will use the word, quote question, unquote, through the negotiations about our meetings inside. It was a referral joke, I think.
- * * * * *

[480] GEORGE SCHAU, a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: Now, will you state your name for the record?

The Witness: George Schau.

Trial Examiner: Where do you live, Mr. Schau?

The Witness: 612 Oakmont Avenue, Erie, Pennsylvania.

DIRECT EXAMINATION

- Q. (*By Mr. Wayman*) Mr. Schau, during the period of the strike in 1959 what was your job?
- A. General manager of the plastics division of Erie Resistor Corporation.
- Q. How long have you held that job?
- A. Since the fall of 1956.

George Schau—Direct.

- Q. Will you tell us briefly the duties of the general manager of the plastics division?
- A. Actually, you are the chief administrative officer of the company, responsible for sales, engineering, production [490] and all of the allied functions related to those particular categories.
- Q. Will you tell us the nature of the products that you manufacture in that division?
- A. We are known as a custom molded company, house, which means we only produce products for specific customers and not a general product for general distribution.

Mr. Wayman: I am going to ask that this little polyethelene bag of plastic parts be marked respondent's exhibit 18.

(Thereupon, an article was marked Respondent's exhibit 18, for identification.)

- Q. (*By Mr. Wayman*) Mr. Schau, I show you a little bag of what appears to be plastic parts that has been marked respondent's exhibit 18 for identification and ask you what it is?
- A. These are samples of the type of work we perform in the division with particular emphasis on the fact, an example of using the blue with the decorative butterfly on it. This happens to be the decorative half of a lady Ronson shaver. We are the only company producing this. We have the only tools to produce it. When it is not produced, they don't produce shavers. The other two small parts again—I brought only small parts because of convenience. We do make parts up to five pounds in weight—there are also [491] individual jobs for television decorative work

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which if not produced would result in no producing of that individual television set. In other words, what I am trying to say, the parts we make are for individual concerns of a specific nature. If I can't produce them, they cannot go out on the open market and buy them.

- Q. You said something about tools. What do you mean by tools?
- A. To produce parts that are decorative of this nature, first of all, you must have a molding die and in addition to that you must have finishing tools which may consist of shields, a special fixture—special fixtures of different types for plating, possibly stamping equipment. These particular tools are the sole property of the customer and not my company.
- Q. Now recalling the time of the strike, did any of your customers remove their tools or molds from your plant in Erie?
- A. Within forty-eight—

Mr. Davidson: I object. I have the same objection to this as I did to the prior witness.

Trial Examiner: I will over rule your objection. Go ahead.

The Witness: Within forty-eight hours of the start of the strike which brought it into about the third or fourth [492] of April one company removed two dies, General Electric of Utica, New York, removed two dies with the accompanying tools, finishing tools from our plant, yes.

- Q. (*By Mr. Wayman*) Did the dies removed represent any substantial part of your production?

George Schau—Direct.

- A. Yes, it was a substantial part of the production, and it was so important to the continuity of my customer that he took this action as rapidly as he did.
- Q. Did you operate the plant, this division, during the strike?
- A. We attempted to, yes, sir.
- Q. Using the level of operations prior to the strike as one hundred per cent, can you express in terms of per cent the operations of the first month of the strike? That would be April.
- A. Very roughly fifteen to twenty per cent.
- Q. Would you do the same thing with the second month of the strike?
- A. Maybe a little bit higher than that. Twenty-five per cent roughly.
- Q. And the month of June up to the end of the strike?
- A. Thirty-five to forty per cent.
- Q. Did you at the time of the strike, the time it started, have a backlog of orders to fill?
- A. Yes, we did.
- [493] Q. Did you have any complaints from customers that you were not filling their orders?
- A. The complaints, of course, were daily. A good deal of my time had to be spent on the telephone trying to answer these complaints which, naturally, are coming in every day under conditions of this kind.
- Q. Did you make any replacement of employees in the plastic division?
- A. Yes, we did.
- Q. Will you tell us in your own words how you went about obtaining and assigning replacements?
- A. This particular function was handled by the plant manager but I worked with him on the program and

George Schau—Direct.

also our personnel department. As we required, had openings and specific jobs to be done, this particular fact was conveyed to the personnel department who in turn provided people to take these jobs. At that time the people who came in replaced the youngest person on a given job classification that we were trying to fill.

- Q. As of any given day during the strike, were you able to tell who had been replaced?
- A. Yes, there was a daily record kept on that.
- Q. Do you recall the twenty year seniority program that has been discussed in this hearing?
- A. Yes, I do, sir.

[494] Did you ever tell the people who were at work in the plastics division of this twenty year program?

- A. Yes, I did.
- Q. Will you tell us when and under what circumstances?
- A. The discussion of the plan which originated back on the 28th of May with the union resulted naturally in some rumors being very rampant throughout the plant and the corporation which was very common during those days, and we were questioned about it. At that time individual discussions were held with staff people and individuals in the plant. However, when the actual procedure was adopted and put on the board on June 15th at that time a meeting was held of all employees of the division in the main office that we have which is very large and could handle a whole group. At that time it was explained completely in detail as it was written.

- Q. Were they told that it was in effect?
- A. Yes, sir.

Gegrün Schau—Direct.

- Q. Did you come to work each day during the strike?
- A. I attempted to come to work each day. There was a number of days I wasn't successful.
- Q. What days were they?
- A. April 2nd—

Mr. Davidson: I object.

Trial Examiner: I took the testimony from the other witness just for the purpose of showing whether or not he was [495] at the plant. I am going to be consistent, if in error, any how. So I will take the testimony from this witness.

Mr. Wayman: I will not pursue it in any great detail.

Trial Examiner: I assume this will be like Mr. Bertone.

Mr. Wayman: Yes.

The Witness: April 2nd, May 7th and on the date of May 8th I finally got in but at a later hour than the normal time.

- Q. (*By Mr. Wayman*) Will you tell us what you saw on those days?
- A. On the 2nd of April and also the 7th of May, more particular the 7th of May, great numbers of people were in front of the entrance gates which prevented entry to the plant, beyond the control of the authorities.

Mr. Davidson: I will object to that. I think it is going beyond the question that was asked and I think it is going beyond the extent the Trial Examiner indicated he would take evidence.

George Schau—Direct.

Trial Examiner: Can I have the last answer read back?

(Answer read.)

Trial Examiner: It may stand.

- Q (By Mr. Wayman) Mr. Schau, did you attend negotiating meetings?
- A. Yes, sir, I did.
- Q. Do you recall in negotiating meetings representatives of [496] the company telling the union of mass picketing and violence and associating that with job assurance?
- A. Yes, that is a subject that was discussed a number of times.
- Q. Will you tell us as well as you can what you remember the subject of discussion was—the substance of the discussion, I am sorry.
- A. Well, the discussions, of course, took several directions as they naturally will when you meet as often and as long as we did. We were trying to point out at that time that we were unable to get people to come to work because of fear, both experienced at the gates of the plant, plus the phone calls that had been reported, plus personal threats which they had received, and the fact that we had given in our hiring of these people assurance of job security, which we felt—in fact I think we stated very carefully it would be a case they would not lose their job as a result of the settlement of the strike, that this was not a very tangible assurance to give the people, and we had to find something that they could actually understand and would really reassure them, that they would have their job.

- Q. You told this to the union?
- A. It was discussed many times.
- Q. Did you participate in any of the meetings in which the decision was made to either hire replacements or adopt [497] the twenty year plan?
- A. Yes, sir, to the best of my knowledge, all of the meetings.
- Q. Did you hear Mr. Shioleno testify to being in those meetings?
- A. I did.
- Q. Is your recollection of the meetings the same as his testimony?
- A. Yes, sir, it is.

Mr. Wayman: I have no more questions on direct.

Trial Examiner: All right, Mr. Fleischut.

Mr. Fleischut: Nothing.

Trial Examiner: You have any questions, Mr. Davidson?

Mr. Davidson: Yes.

CROSS EXAMINATION

- Q. (By Mr. Davidson) Mr. Schau, you stated as of any given day there was a daily record kept as to who was replaced. Who kept those records?
- A. That was handled by the plant manager, and my secretary who has handled personnel work and always has handled it. It was nothing new to her.
- Q. This was a separate type of record for the plastics division?
- A. Yes, sir.

- Q. Now you stated you attended negotiating meetings at which certain reasons were stated to the union for superseniority. [498] Can you tell us when these meetings were held at which this was discussed?
- A. Probably from the middle of May, on to finally culminating in a written procedure which we discussed but did not give to the union, as I recall it, on the 28th of May.
- Q. You were telling them what you had in mind to do, is that correct?
- A. That's correct, but we made the announcement specifically on the 28th.
- Q. Were these meetings at which you stated to the union the specific reason which you recited why you had to give them reassurance—I think that was your word?
- A. Yes, sir.
- Q. And to whom did you state this?
- A. These were stated in open meetings, to the best of my knowledge. It was no side-bar discussion.
- Q. To whom?
- A. Well, anybody that was at the meeting. Colella, Ed, and on down the list.
- Q. Just generally to the group?
- A. When you are discussing problems at a meeting, which I am not going to try to explain to you, because I am sure you are familiar with what they are like, you discuss many, many subjects and many facets of many subjects, and we were being asked as a result of our policy to bring in replacements how well we were making out in that type of thing, and it became [499] a matter of general discussion, as far as that goes.

- Q. And you said for these specific reasons during your general discussion, is that right?
- A. I would imagine we gave half a dozen more than that; maybe sixteen, maybe twenty. I don't know.
- Q. How about some of those other reasons?
- A. I have a very poor memory after one year, but I will do my best. I assume when people call us on the phone and say that "I am interested in coming to work but what's going to happen to me? Am I going to get fired tomorrow or something else," and you say to them no.
- Q. Did you state this to the union?
- A. We were discussing this, yes, the fear of people, because they were asking us the question.
- Q. That's one. Now what was the other reason, or reasons?
- A. There were people who were in the plant who we were not sure were going to come back the next day because of fear and who were saying "is it worth it to be slandered and possibly injured."
- Q. You stated this to the union as a reason?
- A. Oh, yes, sir, very definitely.
- Q. Very definitely.
- A. Yes, we were concerned about it.
- Q. Can you give us a definite instance of when you did?
- A. I can remember a definite case where we discussed some of [500] these and the union asked us if we could tell them who made these threats.
- Q. Who asked you that?
- A. If my memory serves me correctly it was either Colella or Bordonaro asked the question that if we could tell them who they were that was doing this type of thing they would be willing to talk to them.

- Q. This is in connection with the discussion of superseniority?
- A. In connection with the threats to people and the general subject, yes.
- Q. In connection with the general subject. Was this tied into superseniority?
- A. I can't specifically say that.
- Q. Do you remember what date this was?
- A. I can't specifically tell you.
- Q. What were some of the other reasons you gave?
- A. In general, I can't answer that.
- Q. Who was the spokesman for the company at these meetings?
- A. Mr. Shioleno, Mr. Ferrell, Mr. Bertone and at that time Mr. Willis.
- Q. They were present and participated in these discussions?
- A. Yes, sir.
- Q. Now let me direct your attention for a moment to the discussions of the meetings among the members of the company policy committee who determined to institute this. Do you [501] remember discussing the union security clause, the union shop provision of the contract in this connection?
- A. Yes, sir.
- Q. Can you tell us in what respect this was tied in?
- A. Tied in with what?
- Q. With the superseniority policy.
- A. I don't know as there is a direct connection there. Certainly it is one of many facts that would have been considered in discussing the general subject.

- Q. Discussing the necessity of giving the employees job assurance?
- A. Yes, sir.
- Q. Now I am having trouble understanding how this was one of the many facts.
- A. I am having trouble understanding you, Mr. Davidson, what answer you want. I will do my best to give it to you.
- Q. I want the answer that is the proper answer, whatever the discussion was.
- A. Give me the proper question and I will give you the proper answer.
- Q. What was said about the union security clause and the discussion of superseniority?
- A. I can't answer because I am not sure what you are saying. I don't know. That is the key. You are making that the [502] key of the whole thing, and it is not. It was only one of a dozen approaches.
- Q. Well, I am not making it the key. The question is it was stated by Mr. Shioleno this morning and I believe you confirmed it--let me ask you again was the union security provision discussed in connection with the discussion of the superseniority issue among the company management people who met together and decided on this policy?
- A. Yes.
- Q. Now can you tell me what the discussion was?
- A. I think my recollection of that we were discussing the fact we had assured, given people assurance they would not lose their jobs as a result of the settlement of the strike, and under the union shop with present seniority system something would have to be done to supplement that assurance so that it would become a reality and not just a statement.

Q. Now let me ask you—

Mr. Wayman: Let him finish.

The Witness: You broke my train of thought.

Q. (*By Mr. Davidson*) You stated under the union shop something would have to be done. What was the problem created by the union shop that you were considering in this discussion?

A. I was not concerned about that but I know it came up and it has been testified as part of the general conversation, [503] and I agree it was part of the general conversation but it was not the thing, as far as I am personally concerned, that made us take action on this union security clause as you call it.

Q. You can't come up with any more that was said about it?

A. Not in that direct connection, no, sir.

Mr. Davidson: That's all.

Trial Examiner: Do you have any redirect?

Mr. Wayman: Just one question to straighten up this last answer that leaves me a little confused. I think you said union security. Did you mean in connection with the twenty year seniority?

The Witness: No I was merely repeating Mr. Davidson's comment of union security which was a new phrase to me. I am sure I interpreted it as a union shop.

Mr. Wayman: I have no further questions.

Trial Examiner: All right, you may step down.

(Witness excused.)

Gordon D. Ferrell--Re-Direct.

Mr. Wayman: Mr. Ferrell, will you retake the stand, please?

GORDON D. FERRELL, having been previously duly sworn on behalf of the Respondent, was recalled, examined and testified further as follows:

Trial Examiner: You have been sworn as a witness in this hearing and you are still under oath.

[504] *The Witness:* Yes, sir.

RE-DIRECT EXAMINATION

Q. (By Mr. Wayman) Mr. Ferrell, I am recalling you for a limited purpose. I would like for you to tell us whether or not in the course of negotiations you discussed with the union violence and mass picketing in connection with job assurance?

A. Yes, I think I said before when it became necessary for us to enlarge our production force, keep up with our orders, that we were forced to get more people in to do the work and we had to hire replacements. The union, in anticipation of this, because we had told them in the letter of May 3rd this was going to happen, had the mass demonstrations.

Mr. Davidson: I object.

The Witness: Just a minute. On May 7th and 8th—

Trial Examiner: Wait a minute, here. You don't rule on the objections. Is all of this that you are relating now occurring at some meeting with the union negotiating committee? Because that was the question asked.

Q. (*By Mr. Wayman*) Is this what you told the union? Just tell us what you told the union at these meetings?

A. We told the union in order to get people to come to work we had to give them some assurance their jobs would be more than temporary, and that they would not be laid off or lose their jobs as a result of the settlement of the strike.

[505] Q. Did you in any way mention the violence and picketing in connection with this?

A. Yes, we said that these people would not come in and take the abuse that they had to take coming to work and the threats they had to withstand in connection with coming to work and working under strike conditions without some assurance their jobs would not end when the strike was over.

Mr. Wayman: That's all the questions I have.

Trial Examiner: Mr. Fleischut?

Mr. Fleischut: Mr. Davidson wants to ask a few questions.

RE-CROSS EXAMINATION

Q. (*By Mr. Davidson*) Mr. Ferrell, do you have the notes you have been using all along for these meetings?

A. Yes.

Q. First, let me ask you at what meeting did you tell this to the union?

A. If I may have that chart.

Q. Can you tell us this without looking at your notes?

- A. The first—I believe the meeting of May the 11th in which we first discussed the replacements, the replacement program.
 - Q. Did you tell them what you just stated you told the union at that meeting?
 - A. I would say we covered this subject.
 - Q. Covered what subject?
 - A. That I have just testified to.
- [506] Q. What did you say at the May 11th meeting?

Mr. Wayman: Now, if you please, let's not go into everything.

Mr. Davidson: This is cross examination.

Mr. Wayman: He was recalled for a limited purpose.

Trial Examiner: I think you ought to limit it to a particular subject.

Mr. Davidson: To the particular subject with respect to the superseniority question.

- Q. (By Mr. Davidson) What did you tell the union at the May 11th meeting?
- A. I think we told them that we were giving assurance to our replacements that they would not lose their jobs and that under any contract that we would sign, this would involve some form of superseniority because of our large number of people on lay off, some four hundred fifty.
- Q. You mentioned that?
- A. Yes, sir.
- Q. What else did you tell them? Is that the extent of what you informed them on May 11th?
- A. I would say on May 11th, yes.

Q. When did you next go into this topic?

A. This was the subject of discussion practically every meeting we had from then on.

Q. Every meeting?

[507] A. Yes.

Q. What did you tell them at the next one, and what was your next one, your next meeting? You can refer to your list if you want to for convenience. What I want to know specifically is, Mr. Ferrell, at which meeting did you mention this alleged violence and mass picketing in connection with the superseniority issue?

A. This specifically I know was discussed at the meeting following May 28th, or if the meeting was on May 28th.

Q. At or on May 28th?

A. Yes, because at this time—

Q. What did you tell the union?

A. We did tell them about our twenty year policy.

Q. What did you say with respect to this particular topic, to the union, at that meeting?

A. We explained our procedure and our policy and what we were going to do in order to implement the job assurance we had given the people when they came to work.

Q. What mention did you make of the alleged violence and mass picketing at this meeting?

A. I think we probably did not make a specific reference to it at that meeting. Since you asked me to do this by memory I believe the meeting about which you are seeking comments would have been the meeting of May 11th.

Q. What other meeting?

[508] A. May 11th, specifically.

Q. And what other meeting? Any other meeting or was that the only one?

A. Specifically on May 11th we mentioned the violence on the picket line. We mentioned the threats and fines and so on which had been mentioned in the union's letter which had been mailed to these people who were working. We said for these reasons people were afraid and they had to have something more concrete in the way of job assurance, and at the same time—

Q. More concrete than what?

A. Than simply they would not lose their jobs. We withdrew union shop I believe on this meeting of May the 11th. The reason for this again was that we said we did not feel that these people should be required to become members of the union when they were being so abused by the union.

Q. Let's stick now to the issue of superseniority. What did you say? You said you had to give them more assurance. What did you say specifically to the union in this regard?

A. I don't recall anything further that was said that I haven't already said.

Q. Now at what other meeting did you connect these things, connect specifically this alleged mass picketing with the superseniority demand of the company?

A. It has already been testified to, Mr. Davidson. This [509] was a subject of discussion at all meetings. I can't pin it down to what was said at what meeting.

Q. What was said?

Trial Examiner: Let him finish. Go ahead.

The Witness: I have completed it.

Mr. Wayman: I don't think I heard it and maybe the reporter didn't.

The Witness: I said the subject of replacements was an issue right up until the end of the strike. There were many discussions concerning it and what was said specifically at each meeting I wouldn't pretend to tell you because I can't don't have it in detail and I cannot pin it down to what was said at what meeting.

Q. (By Mr. Davidson) Do you have the May 11th notes available?

A. Yes.

Q. Do you want to take a look at them, please. Do you have your handwritten notes also as well as those that are typed?

Mr. Wayman: May I submit that this is improper cross examination, when the witness testified without notes to cross examine him on notes that he didn't use.

Trial Examiner: He may use them to refresh his recollection.

Mr. Wayman: If he needs to.

[510] *Trial Examiner:* All parties have been using notes anyhow, so if he wishes he may do so.

Q. (By Mr. Davidson) You can check your typewritten notes first, if you want to.

Gordon D. Ferrell—Re-Cross.

Mr. Wayman: I guess I might as well go and look at the notes too.

Trial Examiner: Yes, you can join the huddle.

Q. (*By Mr. Davidson*) Can you tell us what, if anything, your notes state with respect to this discussion?

A. My notes simply state that some seniority agreement granting superseniority rights to all strikers who returned to work prior to the end of the strike.

Q. And that's all.

A. That's all.

Mr. Davidson: That's all.

Mr. Wayman: I have just one question. Mr. Ferrell, did you attempt to make verbatim notes of everything that was said about the subject at any of these meetings?

The Witness: No, sir.

Mr. Wayman: These were simply notes such as I am making on this pad, to remind you of things?

The Witness: Yes, sir.

Mr. Wayman: I will ask you this, Mr. Ferrell, do you remember a meeting on June 11th? Look at your notes and see if there was a meeting on June 11th?

[511] *The Witness:* Yes, there was a meeting on June 11th.

Mr. Wayman: I will ask you whether or not there was a discussion of general counsel's exhibit 6 at that meeting?

The Witness: Yes, sir.

Mr. Wayman: That's all.

Trial Examiner: Did you identify the letter as general counsel's exhibit 6?

Mr. Wayman: Yes, that is a letter dated June 10th.

Trial Examiner: Dated June 10th?

Mr. Wayman: That's right. Thank you, sir.

Trial Examiner: Do you have anything further?

Mr. Fleischut: Nothing.

Mr. Davidson: Nothing.

Trial Examiner: All right, you may step down.

(Witness excused.)

Mr. Wayman: May I have just a moment please off the record?

Trial Examiner: All right, you can have five minutes.

Mr. Wayman: Maybe we can bargain for eight.

Trial Examiner: We will take a five minute recess.

(Recess.)

Trial Examiner: On the record.

Mr. Wayman: May I offer the little plastic bag in evidence.

Trial Examiner: Yes, go ahead.

Gordon D. Ferrell—Re-Cross.

- [512] *Mr. Wayman:* May I offer respondeent's exhibit 18, a bag of plastic parts.

Trial Examiner: I suppose your position is the same with respect to the sample kit?

Mr. Fleischut: As to the same kit, I have no objections in either case.

Mr. Davidson: I was the one that objected.

Trial Examiner: I will over rule your objection and received it in evidence.

(The article heretofore marked respondent's exhibit 18, for identification, was received in evidence.)

Mr. Fleischut: I would like to ask Mr. Ferrell a couple more questions.

Trial Examiner: All right, come around, Mr. Ferrell.

GORDON D. FERRELL resumed the stand, was examined and testified further as follows:

RE-CROSS EXMINATION, Cont'd

- Q. (By Mr. Fleischut) Is it now your position that throughout negotiations you stated to the union that you were granting superseniority because of mass picketing and/or violence?
- A. This was not the moving or main reason, no, sir. The reason was to give job assurance.

- [513] Q. My question was is it now your position that throughout negotiations you told the union at ne-

gotiating sessions you were granting superseniority because of mass picketing and violence?

Mr. Murphy: I think he has answered that question.

Mr. Fleischut: He was evasive. That's a yes or no question.

Trial Examiner: I thought he answered it but if you don't think he did, you may have another try at it?

The Witness: Was this the sole reason? No.

- Q. (*By Mr. Fleischut*) Did you say this was a reason throughout negotiations?
- A. This became an increasingly more important reason as the strike wore on.
- Q. When did it become increasingly more important? More of a reason?
- A. After May 7th and 8th, from there on.
- Q. After that time?
- A. Yes, sir.
- Q. There was still mass picketing after the 8th?
- A. There were still threats, still phone calls to employees, threatening them, letters received, damage to property and automobiles.
- Q. There was mass picketing on the 7th?
- A. Yes.
- [514] Q. And on the 8th?
- A. Yes.
- Q. On any other days?

Mr. Murphy: Will you define mass picketing?

Mr. Fleischut: He knows what I am talking about.

The Witness: Not to the extent there was on the 7th and 8th.

Q. (*By Mr. Fleischut*) Was there ever mass picketing on other days?

A. There was more pickets than was supposed to be under the court order, the injunction.

Q. What did the court order allow?

Trial Examiner: Oh, no, I am not going into that. This could just lead on and on and on and on. Now this witness has left the stand and he is being recalled, so let's keep it within reason.

Q. (*By Mr. Fleischut*) Now let's get back to the proposition I started. Did you or did you not throughout negotiations say this was a reason for granting superseniority to the union committee?

Mr. Wayman: Granting superseniority to the union committee?

Mr. Fleischut: Strike that question.

Q. (*By Mr. Fleischut*) Did you or did you not throughout negotiations tell the union committee the reason for the super- [515] seniority was because of violence or mass picketing?

A. As the sole reason, no.

Q. As any reason did you give that reason?

Mr. Murphy: What is the question, "the" or "a" reason?

Q. (*By Mr. Fleischut*) As a reason?

A. Throughout negotiations?

Q. Yes.

A. During negotiations?

Q. During negotiations?

A. Yes.

Q. And after May 11th did you regularly and consistently give violence and mass picketing as a reason for superseniority?

A. I don't think it was. I don't think it was continually repeated as a reason, no.

Q. How many times did you say it?

A. I don't know.

Q. Twenty times or a hundred times?

A. I don't know, Mr. Fleischut.

Q. But you did give that reason?

A. Yes, more than once, and on many times.

Q. On how many days?

A. I don't know how many days.

Q. According to an exhibit referred to here as general counsel's exhibit number 2 May 11th was the thirty-five meeting, and we go up through fifty some, fifty-two; roughly, [516] thirty-one from fifty-two is twenty-one. There were approximately twenty-one regular negotiating sessions during that period of time, isn't that correct?

A. That is correct.

Q. Now how many of these twenty-one meetings did you tell the union that mass picketing or violence was a reason for granting superseniority?

Mr. Murphy: I will object to the question. He has answered it three times, he does not know how many meetings. There was more than one.

Trial Examiner: This is cross examination. I will over rule the objection. Go ahead. You may answer.

The Witness: I say the same thing I said before. I don't know at how many different meetings.

- Q. (*By Mr. Fleischut*) Did you say that at as many as half the meetings?
- A. I am sure this was referred to in our conversations without specifically saying these are the reasons every time.
- Q. Did you ever say because of mass picketing we are granting superseniority?
- A. Per se, no.
- Q. Or words to that effect?
- A. All by themselves, no.
- Q. Then you really didn't say that, is that correct?
- A. As one of the number of reasons we did say it and it was [517] discussed, and it was included in discussions.
- Q. Now on direct examination earlier this week you said superseniority was given in order to promise permanent replacements—replacement permanent tenure, is that correct?
- A. That is correct.
- Q. In order they would not be laid off as a result of the ending of the strike?
- A. That is correct.
- Q. And now you are saying in addition to that you said it was because of mass picketing and violence is that correct?
- A. This became another reason.
- Q. But you actually stated—
- A. The primary reason was the one I gave you and the one I testified to, was to give jobs, job assurance.
- Q. Throughout these twenty-one meetings after the 11th you stated that as a reason is that correct?

Trial Examiner: No. that's not his testimony at all.

Mr. Fleischut: That is incorrect. You only said it on May 11th?

Mr. Murphy: Just a moment. I object to this sort of actually trap-type question. The testimony has been very clear he said it at some of these meetings How many, he doesn't remember.

Mr. Fleischut: First you say on all of them, and now [518] you say on none of them. The answer has been something different.

Q. (*By Mr. Fleischut*) State it in your own words, Mr. Ferrell.

Mr. Murphy: May I ask what he is supposed to state?

Trial Examiner: Suppose you give him the question.

Q. (*By Mr. Fleischut*) How frequently during the negotiations after May 11th did you tell the union committee that you were granting superseniority because of mass picketing or violence?

A. We never made that statement all by itself, naked like that.

Q. You never made that statement?

A. No, sir, not like that.

Q. Did you ever make a statement to that effect?

A. As a secondary—as a secondary reason to the primary reason which was to give job assurance, yes, but we never changed our position on the primary reason.

- Q. The primary reason was to give job assurance?
- A. Yes.
- Q. And the mass picketing really wasn't the cause of it at all, is that correct?

Trial Examiner: I don't know—you have been using the term mass picketing and violence. Actually the testimony of the witness was they were having difficulty getting replacements to come to work because they were being abused coming [519] through the picket line. If you want to cite his testimony, cite it with some accuracy. Seemingly there was no mass picketing after May 11th or May 8th.

Mr. Murphy: It depends on the definition of mass picketing. There was illegal picketing after that date.

Trial Examiner: Oh, well—

Mr. Fleischut: Nothing further.

Trial Examiner: Do you have anything further?

Mr. Wayman: No, not of Mr. Ferrell.

Trial Examiner: Mr. Davidson?

Mr. Davidson: No further questions.

Trial Examiner: All right, Mr. Ferrell, you may be excused.

(Witness excused.)

[520] *Mr. Murphy:* Mr. Puyalie.

Dominic Puyalie—Direct.

DOMINIC PUYALIE a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: Will you state your name for the record, please?

The Witness: Dominic Puyalie.

Trial Examiner: Where do you live?

The Witness: 3803 Tuttle Avenue, in Erie, Pennsylvania.

DIRECT EXAMINATION

- Q. (*By Mr. Murphy*) Mr. Puyalie, what is your position with Erie Resistor?
- A. I am an operation manager in the tubular capacity department in Erie Electronics Division..
- Q. How long have you held that position?
- A. Approximately three years.
- Q. You were an operation manager, then, during the strike?
- A. Yes, I was.
- Q. How big is the department of which you are the operation manager?
- A. It's approximately three hundred twenty-five to a hundred and forty—maybe a hundred and fifty. It varies at times.
- Q. Did you operate or attempt to operate during the strike of 1959?
- A. Yes, we did attempt to operate, and we operated somewhat, [521] the best we could.

Dominic Puyalie—Direct.

- Q. What are the duties of an operation manager in the department—in a department such as yours?
- A. Well, the prime duty of an operation manager is to manage and supervise the making and producing of parts that we hope to sell to customers. We also maintain personnel contact and instruction of people to produce a job well, harmony in the department, schedule and make plans for more orders.
- Q. You are then in close contact with sales and orders, so far as your department is concerned?
- A. Very definitely.
- Q. During the strike of 1959 did your department lose any orders?
- A. We lost a lot of orders.
- Q. Do you want to describe that, how it came about?
- A. It was very difficult. We didn't have enough people to operate, and of course we, as salaried people, did all we could ourselves in producing parts, but we couldn't produce enough. We had orders and orders were available to get, but because we weren't delivering fast enough, soon enough, cancellations came in, and they came in continuously throughout the strike.
- Q. Were there any employees in your department who were permanently replaced during the strike?
- A. Yes, there were. There were many of them.
- Q. Were you able, sir, on any specific date, to tell exactly [522] who had been replaced in your department?
- A. Every single day, from the point that the strike started until it ended, we kept a record—a running record—knowing of every person that we had on the job prior to the strike and knowing of every person that came into the department, either a returnee or a new hiree, we knew when, and who they were.

Dominic Puyalie—Direct.

Q. I will show you General Counsel's Exhibit 12—no.

Mr. Wayman: It is still 12.

Q. (*By Mr. Murphy*) —entitled "Replacement Policy and Procedure, May 27th"—and ask you if you have seen that document before?

A. Yes. I have. This is the general policy that was issued, and we read it and we followed it.

Mr. Murphy: May we have this marked as Respondent's 19?

(Thereupon, a document was marked Respondent's Exhibit No. 19 for identification.)

Q. (*By Mr. Murphy*) Mr. Puyalie, I show you what has been marked for identification as Respondent's Exhibit 19, and ask you what it is.

A. This is a list of all the people that worked in the tubular capacity department prior to the strike, their name, their clock number, their job classification, and their seniority date, and it also is—

Q. Before you go into what it also is, in what order are they [523] listed?

A. In seniority order and job number grouping.

Q. What else is on that list?

A. Also you will find on the list we show alongside of each person a history of what happened during the time of the strike. It shows the people who have come in, on the date that they have come in, and who they replaced.

Q. All right, when was the typewritten part of this list—which appears to be the names, seniority dates and so on of employees as of March 31, 1959—when was that typewritten part prepared?

Dominic Puyalie—Direct.

- A. The typewritten part was prepared just about on March 31st, just prior to the strike, the typewritten part.
 - Q. What about the part which seems to be in pen and ink on the righthand side?
 - A. This was a continuous daily function. As people came in, whether they were new hirees or returned from strike, we placed their name next to the person they replaced, wherever they fit. This was written in ink because the action was constantly changing and it was difficult to typewrite the names in.
 - Q. Now, as an employee came in, then, as I understand it, and became a replacement, his name was marked in ink opposite the name of the person who was replaced?
 - A. That is right, exactly.
 - Q. And in whose handwriting are these pen and ink names?
- [524] A. Most of it is mine. There were times, of course, I wasn't at the plant, and so the foreman in the particular department where the new person came in or the employee came in filled it in for me.
- Q. And on what day, for example, would the foreman or yourself write the name of the replacement on this list?
 - A. On the day that the employee came into the department.

Mr. Murphy: Would you mark this list as Respondent's Exhibit 20 for purposes of identification.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 20 for identification.)

Dominic Puyalie—Direct.

- Q. (*By Mr. Murphy*) Now, sir, I hand you what has been marked as Respondent's Exhibit 20 for purposes of identification, and ask you what that list is?
- A. This is a recap list of the daily list we kept, showing the replaced people and who had filled their jobs. It is a complete total recap. This does not include any other people but the replaced people and the people who had taken their jobs.
- Q. When was this list prepared?
- A. This was prepared at a very late date. In other words, the activity was happening every day throughout the strike, so that nearly at the end of the strike or practically at the end of the strike this list was prepared by the personnel department.
- Q. To whom was it given?
- [525] A. It was given to Ray Bertone.
- Q. I notice that the last name on the list of replaced people in Department 1 is J. Luback, and I also notice the name of J. Luback does not appear in General Counsel's Exhibit 32 as a person replaced, nor on General Counsel's Exhibit Number 30, being the replacement list of July 6th. Can you explain what happened to Mr. Luback? Why he appears on your list but was not on the later list?
- A. Well, this was really an error on our part. When we did get a man in to fill a job that was supposedly the job that Jack Luback had, we actually found it was an error. Jack Luback had been on a leave-of-absence. He had been on a sick leave, and therefore he was not replaced, so we used the man that was to replace Jack—or his job—and we put him on another job, and this caused another replacement, of course.

Dominic Puyalie—Direct.

Mr. Murphy: Now, if it please the Trial Examiner, we have come to a point where I would like to explain to you and to the General Counsel—make an offer of proof, I suppose—in view of your earlier rulings in this hearing.

I would like to offer to prove, through this witness, that because of the general conditions prevailing at the plant on the picket line, both coming into the plant in the morning and leaving at the end of their respective shifts, that because of the reports throughout the plant of threatening phone calls, because of the people, working employees, who had had their [526] cars damaged by stones through the windows, by paint being sprayed on them, by sugar in the gas tanks, because of people who had had their homes splattered with paint, their home windows broken, in some instances fires started, that there was an atmosphere of fear and apprehension throughout the plant, throughout the electronics division with which this witness is familiar; that each morning it took a period of time after the people came in the plant to get them settled down, some actually having to be allowed to lay down, rest; that there was equally a great apprehension in the late afternoon just before they had to go out again at quitting time; that this condition continued throughout the strike up until the final day; that it was a tremendous effort on the part of this witness—this witness and others—to convince the employees, once they came in, that they should continue to come into the plant and come back to work the next day, every day, actually, as it worked out; and that had it not

been for the fact that these employees had an assurance and a promise that they would have sufficient seniority to keep them employed and working after all of this was over with, after the strike was done, the task of Management in encouraging these folks day after day would have been an impossible one, and we would not have been able to maintain our work force.

I propose to prove that through this witness, and I will make a similar offer of proof with other ones later.

[527] *Mr. Davidson:* I object.

Mr. Murphy: Go ahead and object, and I will state my reasons why it is offered.

Mr. Davidson: I object. This is not an offer to prove facts, because of this and because of that and because of something else, and then had it not been for something stated the employees' minds would have been something else. I think if Mr. Murphy wants to make an offer to prove facts, as to what happened, this is one thing; but I have never yet seen an offer of proof stated in this form.

Mr. Murphy: May I state I would be perfectly willing to prove all of these facts, prove whose car got damaged, whose apartment got burned, and whose this and whose that, but we would be here for three weeks, and I don't think that is important.

Mr. Davidson: You are making an offer of proof now.

Mr. Murphy: The offer of proof is to show they had this fear and apprehension in the plant, and it

was necessary to do something to keep these people coming back to work, and they would not have come back to work without the assurance which eventually became the twenty-year plan.

Trial Examiner: I will accept the offer of proof from you along that line, but I do think you have also entwined much argument in what you have already stated. I didn't take that to be your actual offer of proof, but perhaps an argument in [528] support of your contention.

Mr. Murphy: This witness will testify to each of those things, if allowed to.

Now, may I give you my reasons why I think this is not only relevant but absolutely necessary in view of the Board's decisions and Court decisions?

Trial Examiner: I will accept the prior statement as an offer of proof, and it is rejected. I think maybe you had better wait until the end of the testimony before arguing it.

Mr. Davidson: I would like an exception noted to this. I realize it has been rejected, but I object to it as even consisting of an offer.

Trial Examiner: You don't think it is even good as an offer of proof?

Mr. Davidson: That's right.

Trial Examiner: I will consider that an offer of proof and reject it.

Mr. Murphy: While the witness is still on the stand, and before he is dismissed may I ask the

Dominic Puyalie—Direct.

Trial Examiner—you stated that you would like argument later, and what I meant was legal argument as to why this was relevant. You still wish that postponed?

Trial Examiner: Yes, you can save that for your final argument, either oral argument or on a brief.

[529] *Mr. Murphy:* In other words, the argument will not persuade, regardless of what it is, the Trial Examiner to change his ruling?

Trial Examiner: I have already made my ruling on that, and I will have to be consistent, and, as I have already stated, I don't think this is an issue under the pleadings. I think your rights are amply protected with the offer of proof.

Mr. Murphy: Then, while we are making offers of proof, I'd like to have this marked.

(Thereupon, a document was marked Respondent's Exhibit No. 21 for identification.)

Mr. Murphy: I would like to offer in evidence Respondent's Exhibit 21, either in and of itself or, if necessary, through the prothonotary of the Court of Common Pleas of Erie County. I will make an offer to present this in evidence through the prothonotary of the Court of Common Pleas in Erie County, who will testify this is a true and correct copy of a complaint in equity filed by the Erie Resistor Corporation against the International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 613 of IUE, and the several named officers of that local, as well as Charles Copeland and

Dominic Puyalie—Direct.

Joseph Considine, officers representing the International; the sheriff's return, showing service on the defendants; the order of the Court of Common Pleas granted pursuant to the Complaint in Equity, being [530] an injunction against mass picketing, granted by Judge Burton R. Laub on the second day of April, 1959; consisting further of a stipulation of counsel entered into by myself as attorney for the plaintiffs; by James G. Hanes, attorney for all of the defendants; providing that a further order of Court could be entered; a certified copy of that further order of Court dated the 11th of April, 1959, which specifically limited the number of pickets at each door and gate of the plaintiff's plant; the plaintiffs in this equity case, the respondents in the present case.

Further pleading entitled "A petition to compel compliance with the orders of Court dated April 2nd and April 11th"; and an order to show cause, signed by Judge Laub on April 14th; a Motion for immediate hearing the 7th day of May, 1959; and, lastly, opinion of Judge Laub, and Order, dated June 13, adjudging the local union and several of its officers to be in contempt of the earlier orders of Court, fining two of those officers and fining the local union.

I would offer to prove that document being a certified copy of the records of the Court of Common Pleas, and do so through the prothonotary of Erie County.

Mr. Davidson: Objected to on the same basis.

Dominic Puyalie—Direct.

Trial Examiner: You are offering this now, Mr. Murphy?

Mr. Murphy: I would like to offer it now, sir, with the understanding if the offer is accepted, and other counsel [531] insist, we will call the prothonotary himself to say this is a certified copy.

Trial Examiner: I presume there is no question of authenticity?

Mr. Fleischut: No.

Trial Examiner: I don't think this is material to the issues here. I will reject the exhibit, and it may go in the rejected-exhibit file, and since it is a rather lengthy document I will not require you to file two copies of this.

(The document heretofore marked Respondent's Exhibit No. 21 for identification was rejected.)

Trial Examiner: By the way, you have not offered Respondent's Exhibits 19 and 20 in evidence.

Mr. Murphy: I will do so now.

Trial Examiner: Any objection to those lists?

Mr. Fleischut: None.

Trial Examiner: Those exhibits may be received in evidence and marked as Respondent's Exhibits Numbers 19 and 20.

(The documents heretofore marked Respondent's Exhibits Nos. 19 and 20 for identification were received in evidence.)

Dominic Puyalie—Direct.

Mr. Murphy: I would like to make a further offer. I would like to have this marked as Respondent's Exhibit 22.

(Thereupon, a document was marked Respondent's Exhibit No. 22 for identification.)

[532] *Mr. Murphy:* And Respondent's Exhibit 23.

(Thereupon, a document was marked Respondent's Exhibit No. 23 for identification.)

Mr. Murphy: I would like to offer in evidence and ask the National Labor Relations Board to take judicial notice of the respondent's exhibit 22, being an order of the National Labor Relations Board—decision and order of the National Labor Relations Board—dated November 4th, concerning the violence and mass picketing at the plant of Erie Resistor during the period in question, and Respondent's Exhibit 23, being a petition of the National Labor Relations Board to the Court of Appeals, United States Court of Appeals, to the Third Circuit, asking for enforcements of Respondent's Exhibit 22, and the Board's Case Number was 6-CB-603.

Trial Examiner: Is that a reported case? What is the NLRB number?

Mr. Davidson: It is not reported.

Trial Examiner: Unreported?

Mr. Davidson: This is a consent decree upon stipulation, and I think the stipulation did not admit liability or the facts. There is an additional document that should be attached to this.

Dominic Puyalie—Direct.

Mr. Fleischut: I would object to this on the grounds that we have also dealt with these problems of violence so far and I concur with counsel that, if admitted—or placed in the rejected [533] exhibit file—in any event, it must be accompanied with a stipulation in the same case.

Mr. Murphy: I would have no objection to that stipulation being added, and would broaden my offer to include the entire Board records in the case. I do not have a copy, at least with me, of that stipulation. I assume I have one some place.

Trial Examiner: Was that an order entered on stipulation?

Mr. Fleischut: Yes, sir. The point being that in paragraph 8 of that stipulation it is indicated the signing and execution of the stipulation does not constitute an admission of violation, and although I believe the entire case should be rejected, the stipulation should accompany the Respondent's Exhibit 22, no matter what its disposition.

Trial Examiner: Well, it is part of the Board's official records, and it is a Board decision, being on stipulation or otherwise, so — the action just referred to, I can take judicial notice of it—and in view of that fact I will receive these documents in evidence as Respondent's Exhibits 22 and 23.

(The documents heretofore marked Respondent's Exhibits Nos. 22 and 23 for identification were received in evidence.)

Mr. Davidson: May I state one further objection to it?

Dominic Puyalie—Direct.

Trial Examiner: It won't do you any good, but go ahead and state it.

[534] *Mr. Davidson:* The charging party is not a party to this case.

Mr. Fleischut: This—it is my understanding the Trial Examiner will take judicial notice of the attached stipulation, although it does not accompany the Respondent's—

Mr. Murphy: If you have a copy, attach it.

Mr. Wayman: We will makes copies.

Mr. Fleischut: May it be submitted as an attachment to Respondent's Exhibit 23?

Trial Examiner: All right. Be sure^b you do that, and at the close of the hearing the reporter can turn it over to you and you can supply the stipulation.

Mr. Fleischut: Further noting the respondent here is not a party in the CB case.

Mr. Wayman: The records themselves show who is a party.

Mr. Fleischut: The charging party.

Mr. Murphy: Except to the effect the charging party is a constituent part of the charged party in that case. I don't think that will be denied, will it?

Mr. Fleischut: I don't think that is contained in the body of the agreement.

Mr. Murphy: Is there any^b doubt about it? You may cross examine this witness.

CROSS EXAMINATION

Q. (By Mr. Davidson) Is your department within the elec- [535] tronics division?

A. Yes, it is.

Q. I wonder if you can identify this for me, please?

A. This is the Erie Electronics—

Mr. Wayman: He may be able to identify it, but I can't hear what you are saying. Is it something about an exhibit? Has it been marked?

Mr. Davidson: No. We will mark it as Charging Party's Exhibit 5.

(Thereupon, the document above referred to was marked Charging Party's Exhibit No. 5 for identification.)

Q. (By Mr. Davidson) Can you identify that for us, please?

A. It is the Erie Electronics News issue of Friday, August 28th, 1959.

Q. You recognize it as an issue you saw at that time?

A. Yes, I do.

Q. Will you tell us what the distribution of that is?

A. To my knowledge—I am not exactly sure. As a matter of fact, I don't know that I can tell you because I don't distribute these. I don't have anything to do with it. I get a copy, myself.

Q. Is it distributed in the plant?

A. Yes. Every employee in the plant, in the electronics division, gets a copy.

Q. This is distributed by the company?

[536] A. The Erie Electronics Division.

Dominic Puyalie—Cross.

Q. Of Erie Resistor?

A. Yes.

Mr. Davidson: Unless Mr. Wayman objects to offering this through his witness, I would like to offer it.

Mr. Murphy: May we ask what relevance it has?

Mr. Davidson: The testimony has been given as to the impact of the strike on the company's operations. This document, which is a company document, is relevant to that issue.

Mr. Murphy: In what particular, sir? This document talks about the pension plan.

Mr. Davidson: On page 1.

Mr. Murphy: This part that is underlined?

Mr. Davidson: I don't know if it is underlined or not.

Mr. Murphy: May I ask Mr. Davidson if he is referring to the consolidated balance sheet of the corporation?

Mr. Davidson: I am referring to the entire article.

Mr. Murphy: I'm afraid I will have to object as to the purpose offered unless you are more specific. For example, there is a statement as to the consolidated balance sheet, and includes plants in England, Canada and every place else, and has nothing to do with the strike whatsoever. If there is some specific purpose that shows it's relevant I will be happy to agree to it.

Dominic Puyalie—Cross.

Trial Examiner: What's the date of that paper?

[537] *Mr. Davidson:* August 28, 1959, approximately one month after the termination of this strike.

Mr. Murphy: Approximately two months.

Mr. Davidson: One month after the signing of the contract and two months after the termination of the strike, and it has an article based on the August 7th interim report to the shareholders of the Erie Resistor Corporation, stating its savings—

Mr. Murphy: I will object to anything on the interim report to the shareholders. It really deals with many, many plants. I will object unless there is something specifically referring to this plant.

Mr. Davidson: It states also during the strike as much work as possible was transferred to the company's other plants in this country and in Canada, and, as a result, these plants operated at increased levels while the struck plants kept operating on a partial basis.

Mr. Murphy: We will stipulate that that sentence is true,

Mr. Davidson: It also states that the sales of the company during the first twenty-four weeks amounted to \$10,579,110 as compared to sales of \$9,384,450 for the same period in 1958.

Mr. Murphy: This is completely irrelevant.

Trial Examiner: I don't see where that has any bearing. Do you want to accept counsel's stipulation concerning the reduced production at the struck plants?

Dominic Puyalie—Cross.

[538] *Mr. Davidson:* I'd be happy to accept that stipulation, but I see no reason why they should not go into evidence in addition.

Trial Examiner: I don't see where it has any bearing at all on this. It's two months after the strike.

Mr. Davidson: It's for the first six months, I believe. Covering the first twenty-four weeks of 1959, which I think takes us right through the period to which the contract was signed.

Trial Examiner: I am still not impressed. Counsel offers to stipulate the point you read; if it has any pertinency at all in this case, and you have accepted that stipulation so I will reject it.

Mr. Davidson: Can I have this placed in the rejected file also, please?

Trial Examiner: Yes. You may put it in the rejected file.

(The document heretofore marked Charging Party's Exhibit No. 5 for identification was rejected.)

Q. (By Mr. Davidson) With respect to Respondent's Exhibit—the first document that was offered through you—setting forth a list of employees, with the handwritten notes on it—can you tell us what the asterisks stand for next to the job numbers in the first column?

Mr. Wayman: Could we straighten out that number?

[539] *Trial Examiner:* It is number 19.

Mr. Murphy: May I state prior to that copy given you was put together after being photostated in reverse order. This is actually the first page, and there is a legend on it that will help you.

- Q. (*By Mr. Davidson*) It helps a little bit. Can you still tell us for the record—it is pretty hard to read on this—can you tell us what the asterisks stand for?
- A. I can read it for you on this copy. The "X" designates people replaced. The star designates people not replaced. And the check mark designates people returned.
- Q. That's returned prior to the end of the strike?
- A. That's right.
- Q. The asterisk, I take it, appears next to column one? All of those marks are an asterisk?
- A. Yes.
- Q. And the check marks are next to names? I am confused. I am sorry. On the first page, about the middle, is the name of F. Daley. There is a mark next to that name. Is that an asterisk or a check mark or a cross?
- A. Are you referring to number 141, F. Daley?
- Q. 141, that's right. Clock number, I assume?
- A. I don't see that on here.

Mr. Murphy: May we go off the record a moment?

Trial Examiner: Off the record.

[540] (*Discussion off the record.*)

Trial Examiner: On the record.

Dominic Puyalie—Cross.

- Q. (By Mr. Davidson) The mark next to F. Daley, 141, on the middle of the page.
- A. Yes. That's to designate people not replaced.
- Q. When were those marks put on?
- A. Those were in the recap time. We naturally have to make this long list to give to Mr. Bertone. We had a difficult situation, so we put asterisks and check marks and "X" marks so it could be designated on another sheet.
- Q. All of these marks were put on at the end of the strike, is that correct?
- A. The marks, yes. I would say most all. There may have been some that have been put on during the time that the posting came on.
- Q. Did you put them on or did someone else?
- A. It was between myself and the foreman in recapping this thing.
- Q. Would you look at the one the third from the bottom? D. Kenzora, Number 19, and in the margin next to the first column, under "Job No.", is 320, and is that a star?
- A. That is the previous check mark we put on this sheet when we were counting people that were replaced, and of course—
- Q. Excuse me. Go ahead.
- A. Afterwards, in the recap, we had to make another mark so [541] we could signify our proper count and our proper posting.
- Q. Which are the marks that count there? The ones out in that margin next to the job number, are they earlier marks that were crossed off at the end?
- A. The recap marks are the ones—something meaning something very positive—and that is, as I explained,

the "X" mark designates people replaced, the star represents people not replaced, and the check mark designates people returned.

- Q. Those marks are all to the right of the name of the employee, is that correct?
- A. Right.
- Q. And the other marks to the left of the name or to the left of the job number are prior marks and are crossed out?
- A. Yes, I would say most of them may be. I don't know if some of them might have been put on the same day that one of the "X" marks were put on.
- Q. Now, on this J. Luback, whose job is circled—530—is says "on sick leave" and "do not replace". When were those words written on this document?
- A. I do not recall that exactly. We had, as I mentioned before, we had made an error when we got a new employee in. He was to replace a given job that we had, and Jack Luback was on it, and so naturally we marked our list to replace. We put an asterisk along the lefthand side, you note, but it was later found that this man was on sick leave, and we were [542] not going to replace this particular man.
- Q. These words were probably put on here then sometime after the termination of the strike?
- A. Oh, no. No.
- Q. Sometime after he was replaced?
- A. Yes, that's true, but not after the termination. We decided this, maybe, a short time afterwards. I don't know the date.
- Q. What did you do with Mr. Mulhalczick's name? His name appears as the man who replaced Luback.

Dominic Puyalie—Cross.

- A. I can't tell you from this sheet. I would have to refer to another sheet here, the previous sheet that we saw. Even this was the recap, in error, on John Mulhalczik.
- Q. Can you tell me the date of the first sheet you are looking at, next to his name? Mulhalczik?
- A. 6/24/59.
- Q. What does that day represent?
- A. This was the day that John Mulhalczik came to work for the company.
- Q. That's the day the name was written on the list?
- A. Right.
- Q. Were there other cases on which it was discovered that employees had been replaced who were on sick leave or other types of leaves-of-absence?
- A. No, not in the tubular capacity department. I think that [543] was the only misplacing there.
- Q. Were there any other errors on this list discovered in the course of recapping or subsequent thereto?
- A. Not that I know of, no.
- Q. I take it none of this information was transmitted to Mr. Bertone until after the termination of the strike?
- A. Oh, no, that's not true.
- Q. When was it transmitted to him?
- A. Well, maybe in sum after the termination of the strike it might have been, but he was in constant touch with this, and other people, too.
- Q. How did you transmit the information to him?
- A. Well, we gave him a copy, a summarized copy, similar to the one you have seen.
- Q. At the end of the strike?
- A. This is one way, but daily when he approached us we also gave him information.

Dominic Puyalie—Cross.

- Q. You gave him no written reports?
- A. Not at all times. There may have been sometimes that he wanted a listing of people's names. We had it, of course, on this sheet.
- Q. And the second list, I take it, represents nothing more than a transference of the information on the first list?
- A. That's right.

Mr. Davidson: That's all.

[544] *Trial Examiner:* Do you have any questions?

Mr Fleischut: Not of this witness.

Trial Examiner: Any redirect, Mr. Murphy?

Mr. Murphy: No, sir.

Trial Examiner: You may step down.

(Witness excused.)

Horace S. Herrick—Direct.

HORACE S. HERRICK a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: State your name.

The Witness: Horace S. Herrick.

Trial Examiner: Where do you live?

The Witness: 205 Marshall Drive, Erie, Pennsylvania.

DIRECT EXAMINATION

- Q. (By Mr. Murphy) Mr. Herrick, were you employed by Erie Resistor Corporation during the strike in 1959?
- A. I was.
- Q. In what capacity?
- A. I served as Assistant General Manager, Erie Electronics Division, reporting to Mr. Shioleno.
- Q. What was your responsibility?
- A. Direct responsibility, material control, customer service, custom engineering.
- Q. Will you speak up?
- A. Most activities except manufacturing, and during the strike [545] some manufacturing was my responsibility, and it was my duty to see the customer's needs were taken care of as well as possible, to prevent especially the company losing certain customers; that is, irrevocably. This was a great danger throughout the entire period of trouble, to see there was material available, when needed, to produce these important orders, to see that operations, jobs,

were staffed as well as possible to produce the materials we had to. I did all of this through working with the operation managers and various department heads.

Mr. Shioleno also did this. I did this in his absence, and sometimes we did this together. We would be required to make daily rounds through the plant to see which jobs and operations were functioning, where there were shortages of people—that is, where there were jobs unfilled that we had expected to be filled—and, in doing this, I had occasion to work very closely with the operation managers. I also had occasion to work very closely with the foremen and to talk with the actual working staff in the plant.

- Q. You heard the prior witness describe Respondent's Exhibit 22? Excuse me. Exhibit 19, did you? Respondent's 19? His list of his department by seniority?
- A. I did.
- Q. I will ask you what records were kept by the other operation managers.

[546] A. At any time I found every operation manager knew exactly who was working in his area, whether the employee was a replacement employee, and, if so, who that replacement employee had replaced. I found, in almost every case, written records were kept of this either on sheets of paper or in card files. The only exception to this may have been a department where only one or two workers were involved, a very small service section.

Horace S. Herrick—Direct.

- Q. In other words, did all of the other department heads have records similar in nature to Respondent's Exhibit 19?
- A. They did.
- Q. On any given day could you, as assistant division manager, have stated exactly who had been replaced and by whom?
- A. In a very short time we could have recapped the situation for the whole division, yes.
- Q. What would you have had to have done to have got that specific information?
- A. Simply called on the various operation managers, department heads, and put that list all together into one list.

Mr. Murphy: All right, at this point I would like to make a further offer of proof, through this witness, to be on the record.

Trial Examiner: Is this in connection with acts of violence?

Mr. Murphy: Not the specific acts of violence, but what effect these acts of violence had upon the people in the plant.

[547] *Trial Examiner:* Do you want to make your offer through the witness?

Mr. Murphy: I'd like to make an offer as to what he would testify to if allowed to so testify.

Mr. Davidson: I don't think the last offer was ever tied in to the witness on the stand.

Trial Examiner: There is no question in my mind about it.

Horace S. Herrick—Direct.

Mr. Murphy: No question it was tied in or was not tied in?

Trial Examiner: It was tied in.

Mr. Murphy: I'd like to make an offer of somewhat similar nature, as to what this witness will testify to, if allowed.

Trial Examiner: All right, you may make your offer of proof in line with my ruling that I will not take any testimony concerning picket-line misconduct or acts of violence.

Mr. Murphy: Specifically.

Trial Examiner: In line with my ruling, you may make an offer of proof as to what this witness would testify to had the objection not been sustained.

Mr. Murphy: For the record, I should like to offer to prove by this witness that in line with his duties as assistant division manager it was his responsibility to tour the plant, to talk with the employees, to do his best to keep their morale [548] up; that at the beginning of every work day there were always large groups of employees—at least after replacements started coming in—who were so shaken by the experience of coming into the plant that they could not be assigned to work for periods ranging from fifteen minutes to an hour. It was almost a daily occurrence to have to allow some of these employees—particularly the women—to sit down or lay down, rest; and that the employees were also daily in fear and apprehension of leaving the plant at night.

Horace S. Herrick—Direct.

Mr. Davidson: I object. I don't understand how this witness or the other one could testify as to the state of mind of the employees under him. He can offer to prove what this witness observed, but certainly not what was going on inside their minds.

Mr. Murphy: I would suggest to the Trial Examiner this witness can observe fear and hesitancy.

Trial Examiner: I will agree he couldn't go into the state of mind of any individual. Of course if there were any complaints from these individuals or statements by them it would be a different thing.

Mr. Murphy: Continuing, then, I offer to prove through this witness that large numbers of the employees continually complained to him as to events transpiring at their homes after they left work, such as threatening phone calls, damage to vehicles and homes. They constantly complained to him con-[549] cerning the problem of coming in and out through the picket line, and that because of this it was one of his duties to do his best to insure these employees would continue to come in day after day and withstand and overcome their complaints, and that it is his opinion—from his own observation and complaints coming to him from these employees.

Mr. Davidson: I object to his opinion.

Trial Examiner: Overruled.

Mr. Murphy: That without a seniority system which would guarantee the employees continued employment after the end of the strike, it would have

Horace S. Herrick—Direct.

been impossible to keep large groups of them coming back day after day.

That's the extent of my offer.

Trial Examiner: That concludes your offer?

Mr. Murphy: Yes.

Mr. Davidson: I would hope that counsel for the Respondent would remember that an offer of proof is supposed to be a good-faith offer of what he can prove through a witness. I think these last two offers have been so obviously speeches and argumentative that he couldn't possibly hope to prove them through this witness or any other witness.

Mr. Murphy: I'd like to put that to a test and let this counsel see whether we can prove it or not.

Mr. Davidson: Not on this record or any other.

Mr. Murphy: You seem to be afraid that we can prove the [550] statement.

Mr. Davidson: I'm not afraid of anything.

Trial Examiner: I made that suggestion at the beginning. I asked you if you wanted the offer to come through the witness.

Mr. Murphy: I'm sorry.

Trial Examiner: I think it's too late now. I think it's water over the dam, now that you have made your offer. I don't think it would serve any purpose whatever to take the offer through the witness now. I agree I think some of this is speculative and probably goes to the intent or the subjective

Horace S. Herrick—Direct.

state of mind of the individuals, and there is some opinion in there. However, I will permit the offer of proof to remain, and I will reject the offer.

Mr. Wayman: May we go off the record a moment?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record. Have you concluded your direct examination of the witness, Mr. Murphy?

Mr. Murphy: Yes, sir.

Trial Examiner: Any cross examination? Mr. Fleischut?

Mr. Fleischut: None, sir. However, I think it should be understood the General Counsel joins in the objection voiced by Mr. Davidson. For the purpose of shortening the record, I have not objected and made a speech on each of these occasions. I have no questions of this witness.

[551] *Trial Examiner:* Your silence shall not be construed as consent.

Mr. Fleischut: Thank you, sir.

Trial Examiner: Do you have any questions?

Mr. Davidson: Yes.

Trial Examiner: You don't have to ask them.

CROSS EXAMINATION

- Q. (*By Mr. Davidson*) Mr. Herrick, with respect to your statement, you said any time everyone knew who was working where and who had replaced whom, I believe. I hope I have fairly stated it. Can you explain to us what kinds of assurance or what kinds of information you based those statements on?
- A. Daily interviews, daily discussions—almost daily. I wouldn't say every day during the strike that it was, but it would be—
- Q. In which you asked—

Mr. Murphy: Let him finish.

The Witness: It would be almost daily, because it was our practice to go through the plant and talk with the operation managers, the foremen and some of the employees, and to keep up the morale and find out which jobs were running, and, in addition to this, make certain that the division policies were being adhered to by each operation manager and department head.

- [552] Q. (*By Mr. Davidson*) Did you check the list to see what they stated, or did you go behind them to make certain the right name was always next to the right place?
- A. It was quite easy to see that accurate lists were being kept, and that the replacements were being made correctly, because the seniority dates were shown.
- Q. And in every department the practice was the same; to take this type of list—I assume this is

provided by the company, a typewritten list with job number, name, clock number, seniority date?

- A. No. Sometimes it was a card record, and sometimes it was a sheet, and sometimes it was typewritten and sometimes in pencil. However, in every case the seniority dates were shown, as well as the names of the replacements and the replaced.
- Q. The card records were a separate card for each employee?
- A. Each person.
- Q. Was it kept in order?
- A. Showing the person on the job, and who that person had replaced.
- Q. In order of seniority dates they were filed?
- A. Seniority dates were shown, but they weren't filed in order on seniority dates.
- Q. Can you tell by a perusal of these if the right name was entered in the right place?
- A. I didn't verify their accuracy, if that's what you are [553] saying.
- Q. You were told by the people who reported it to you that they were accurate, is that correct?
- A. No, I didn't ask the question. I just asked who was the replacement — who replaced who — and was shown the kind of record they were keeping, and I was satisfied it was accurate.
- Q. This was true generally everywhere you checked?
- A. Right.

Mr. Davidson: That's all.

Trial Examiner: Do you have any redirect?

Mr. Murphy: No, sir.

Harry S. Malutich—Direct.

Trial Examiner: You may step down.

(Witness excused.)

Mr. Murphy: Could we go off the record a moment.

Trial Examiner: All right, off the record.

(Discussion off the record.)

Trial Examiner: All right, the hearing will be in order.

HARRY S. MALUTICH a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

- Q. (By Mr. Murphy) Were you employed by Erie Resistor?
- A. Yes.
- Q. Were you employed during the strike in 1959?
- [554] A. Yes.
- Q. What was your job?
- A. I helped maintain the equipment, helped set up the lines in the departments.
- Q. What was your title?
- A. My title at that time was mechanical engineer, and the maintenance crew worked for me.
- Q. Is this plant maintenance or machinery maintenance?
- A. Machinery maintenance.
- Q. As such, during the strike, did your duties take you throughout the Electronics Division of the plant?
- A. Entirely; yes, sir.

Harry S. Malutich—Direct.

Mr. Murphy: I should like to make an offer of proof through this witness by question and answer as to the conditions in the plant.

Trial Examiner: I will let you make the offer through this witness, but, in order to keep the record straight, this will pertain to conduct on the picket line.

Mr. Murphy: This will pertain to the attitudes of the work force due to conduct on the picket line. As I understand your ruling, you do not want any specific instances on the picket line.

Trial Examiner: I didn't want any evidence pertaining to what is commonly known as misconduct on the picket line. All right, go ahead. This is coming in the nature of an offer [555] of proof?

Mr. Davidson: May I ask a question as to ground rules before we start? Are any and all questions fair on an offer of proof, regardless of whether or not—assuming the subject matter is immaterial—the question itself would be objectionable?

Trial Examiner: Since it is coming in as an offer of proof, and strictly as an offer of proof, I am not going to—you mean on technical objections as to questions?

Mr. Davidson: Questions as to state of mind, what people thought and what people felt. Are you going to permit such questions to be answered?

Trial Examiner: No. It doesn't give a witness any more leeway on psychic powers than it would if he was testifying to something material.

Harry S. Malutich—Direct.

Mr. Davidson: In other words, you will entertain objections to specific questions?

Mr. Murphy: Yes, but you will not have a right to cross examine.

Mr. Fleischut: Would it be well to establish—since we can't cross examine—whether this man was in a supervisory capacity within that period of time, within the meaning of the Act? As I understand, if he is a supervisory employee during this period of time,—

Mr. Murphy: I don't see that has anything to do with it.

[556] *Mr. Fleischut:* All right.

Trial Examiner: Go ahead. You may start on your offer.

- Q. (*By Mr. Murphy*) Mr. Malutich, I think you did say your responsibilities took you throughout the plant in the electronics division during the strike?
- A. Yes, sir.
- Q. Is that the south and north plant?
- A. The south and north plant.
- Q. I will ask you as to what you observed various mornings as soon as the working force came in during the strike.
- A. Work actually didn't start for some half hour or hour. People were—there was a group of discussions, and people just didn't seem to settle down to go to work. As we went around the plant maintaining equipment you would sit down at a machine where a girl was operating the machine, and she

immediately would start telling you about how afraid she was, and she didn't want to come to work tomorrow, and she didn't know what she was doing in there; and go to another plant for another piece of equipment, where a fellow would be working, and the same—he would make the same statement. He would say "Gee, I was afraid to come in this morning, and I wonder how it's going to be going out tonight".

Mr. Davidson: I object his saying what they would say.

- Q. (*By Mr. Murphy*) Did any people state this?
A. I'm telling what was said.

[557] *Mr. Davidson:* Without identifying them.

Q. *The Witness:* Going from the south plant to the north plant, working on the equipment, two other fellows, and they were afraid enough I used to have to carry their tools across the street, because they didn't want to carry tools across the street.

- Q. (*By Mr. Murphy*) Does 12th Street separate the north plant from the south plant?
A. Yes, sir.
Q. This is a wide public thoroughfare?
A. Yes.
Q. Where is the cafeteria?
A. It is in the north plant.
Q. Where is the bulk of the manufacturing operation?
A. The bulk of the manufacturing is in the south plant.

Harry S. Malutich—Direct.

- Q. Now, in normal times when there is not a strike will you tell us what, if any, percentage or share of the south plant employees go to the north plant cafeteria?

Mr. Davidson: I object.

Trial Examiner: Overruled.

The Witness: Of the people that were working during the strike, the majority of those people eat in the cafeteria during normal times.

- Q. (By Mr. Murphy) How about during the strike?
- A. During the strike I don't think there were a total of [558] possibly ten people that would cross the street at lunch to eat.
- Q. Now, you said that various employees at the machines made these comments to you. Was this one day, or how many days during the strike did you hear this?
- A. This continued from day one until the last day.
- Q. Was this just one or two employees or the same ones every day?
- A. This was a predominant feeling throughout the entire plant. Comments were such any time you happened to go into the electronics division.
- Q. Later on during the strike what shift were you working?
- A. Later on during the strike we worked a shift from noon until midnight.
- Q. Will you tell us what employees said and did about leaving at midnight?
- A. Yes, sir. Leaving at midnight, a group of us—approximately thirty or thirty-five, who felt it was much safer to leave the plant in a group, en masse

Harry S. Malutich—Direct.

—we met at the exit to the plant, which is also the entrance to the parking lot. We waited there until the entire group was there, and we got in our cars and started out in a continuous line, and then we would stop on 12th Street and wait to make sure that all of the cars had gotten out of the parking area.

- Q. Were there instances, to your knowledge, of people who [559] came to work and then later on refused to come any further, any longer?
- A. Very definitely. I know of two specific cases where people were at work and were threatened—

Mr. Davidson: I object unless he was present.

- Q. (*By Mr. Murphy*) Were you present at either one of these?
- A. Yes, sir.
- Q. Tell us what your experience was.
- A. On the day of the 7th we were unable to get in the plant, and one of the bargaining-unit employees who had come back to work was riding in with me at around eleven o'clock, and since we were unable to get in the plant I took him home, and as I let him out of my car and he started into his house, out of his house came at that time a union steward. I immediately hopped out of my car with the other fellow that was with me, and we went into the house. The union steward was present, and he said he had come down to warn this fellow to not go back to work because they were out to get him.
- Q. Did this individual come back to work that day?
- A. He did not come back to work for a period of around three weeks.

Harry S. Malutich—Direct.

Q. Did you observe or experience or hear any threats given by any officers of the union?

A. Yes, sir. I did.

Q. Explain.

[560] A. I heard the president of the union threaten to kill this man if he ever got him alone.

Q. Did you ever see any or experience any property damage to the employees' vehicles?

A. Yes, sir. I did. I was bringing in a bargaining-unit employee that lives down in my area of the country, and he was parking his car on a back country road and riding in with me, and he came in this morning and his car was there and I picked him up and took him home that night—this was when I was on the day shift—I will correct that—and when we got to his car there was a can of red paint and a can of yellow paint, one dumped on his hood and one dumped on the roof of the car, and sugar in the gas tank.

Q. Did you experience any further obstacles in leaving the plant at various times?

A. There were continually tacks in the parking area.

Q. What kind of tacks are you talking about?

A. Roofing nails about an inch and a half long, and as we were leaving the parking area at night, twelve o'clock, a group of us each night walked through the parking area in the vicinity of the cars, over to Popular Street and down Popular Street looking for tacks and picking those up so we didn't get flat tires.

Mr. Murphy: I think that concludes my offer of proof with this witness.

Harry S. Malutich—Cross.

[561] *Trial Examiner:* All right, I will reject your offer.

Mr. Murphy: That's all.

Trial Examiner: Just a moment. Do you have any questions of this witness?

Mr. Davidson: It is my understanding I am not entitled to cross examine.

Trial Examiner: Not on the offer of proof, no.

Mr. Davidson: Did he testify as to anything else?

Mr. Murphy: No.

Trial Examiner: He gave his name and address.

CROSS EXAMINATION

- Q. (By Mr. Davidson) Did you state your position in the plant?
A. Mechanical engineer and supervisor of machine maintenance.
Q. Were you in the bargaining unit?
A. No.
Q. You had employees who you supervised in their duties?
A. Yes, sir.
Q. How long have you worked for Erie Resistor?
A. Oh, two and a half years.

Mr. Davidson: That's all.

Trial Examiner: You may step down.

(Witness excused.)

Offers of Counsel.

Mr. Murphy: We would now like, to protect our record, to make a general offer of proof by a series of witnesses, includ-[562]ing the sheriff of Erie County, Mr. John Coates, and various supervisory and non-bargaining-unit employees who worked throughout the strike, to show specifically what happened on the picket line on the various days, from the beginning to the end of the picketing, the difficulty of getting in, and to show—through motion pictures taken and by individual stills taken—the conditions at the plant at various mornings and afternoons as employees were coming in and out, and to show further—by specific witnesses—specific individual acts of violence to persons in the nature of assault and battery, to personal property, particularly automobiles, and to homes and apartments.

I think that, in a general nature, is our offer, sir.

Trial Examiner: All right, I will reject that offer.

Mr. Murphy: With that offer, the Respondent rests.

Trial Examiner: Does the General Counsel have any rebuttal?

Mr. Murphy: I have a question or so concerning the offer.

Mr. Fleischut: Can you name names regarding the offer or make reference to this court transcript?

Mr. Davidson: Is this transcript coming in?

Offers of Counsel.

Mr. Murphy: No, this transcript belongs to the Court of Common Pleas, and I am not about to go and make a copy of some two or three hundred pages for a rejected exhibit.

Mr. Fleischut: I wonder if there isn't a procedure where-[563]by it could remain here and remain available, and then we would have a record which may be evaluated at such time as it need be evaluated.

Mr. Wayman: We have offered a certified copy of the proceedings in this Court on which you will find the number and term of Court and from which you can discover the transcript of testimony that backs up the decision and order of the Court. I think perhaps that is sufficient reference to the paper you are talking about.

Trial Examiner: I don't know what good it would be to refer to this document by case number or its location, because if I am in Washington it's not doing me much good sitting up here in Erie, and the same is true when the Board considers this matter.

Of course, I know in the injunction cases in the United States District Courts, where the General Counsel obtains an injunction, the record in many cases is stipulated into the Complaint case, but that is a different situation. The record is available in the regional office and available in Washington. But this, of course, would not be. If you want to make this a little more specific on your offer of proof, you mentioned the sheriff's name, and if you want to

Offers of Counsel.

mention other persons who would testify to that effect you might mention them.

Mr. Murphy: We would, through the testimony of Mr. George Fryling, II, show the moving pictures; other witnesses whom we [564] would put on the stand would be Messrs. Donatelli, Mikoda, Kivonak, Miss or Mrs. Delio, Deputy Sheriff Hamisek, Messrs. Yeager, Shoff, Locker, Hamilton, Deutch, Sparks, Miss Agrest and Miss Izzo. I think that's enough.

Mr. Fleischut: Would that limit the list of witnesses available for this offer?

Mr. Murphy: No. If this testimony were admitted we would put—as to specific items of damage and violence and misconduct—put probably fifty on. We think many would be corroborative, and not necessary to prove the point.

Trial Examiner: The Company now rests its case?

Mr. Murphy: Yes.

Mr. Fleischut: I will call Mr. Bordonaro for about two questions.

Edward F. Bordonaro—Re-Direct.

EDWARD F. BORDONARO a witness called by and on behalf of the General Counsel, having been previously duly sworn, was recalled, examined and testified further, as follows:

Trial Examiner: You have already been sworn as a witness in this hearing, and you are still under oath.

RE-DIRECT EXAMINATION (Continued)

Q. (*By Mr. Fleischut*) Mr. Bordonaro, do you recall any occasion during negotiations when the company negotiators said that super-seniority must be granted because of picket-line violence or mass picketing?

[565] A. No, I do not.

Mr. Fleischut: No further questions.

Trial Examiner: Is there any cross examination?

Mr. Wayman: I have one question.

RE-CROSS EXAMINATION

- Q. (*By Mr. Wayman*) Mr. Bordonaro, will you look at General Counsel's Exhibit 6, please? Do you have that exhibit?
- A. Yes.
- Q. Have you ever seen that exhibit before?
- A. I have.
- Q. Isn't it true at the meeting of June 11th you discussed that exhibit and its contents?
- A. To the best of my knowledge I did not.
- Q. You don't remember that?
- A. I don't remember that.
- Q. Did you ever discuss this exhibit and its contents with any of the negotiating people during the course of the strike?
- A. Could I see that again?
- Q. Yes.
- A. I didn't read it all.
- Q. Your counsel just took it away from me, and now we will have to find it again. Take your time, and read it, Mr. Bordonaro.
- A. Again, I haven't read all of the letter. There are some [566] things in the letter that had been discussed in negotiations, that's true.
- * * * * *
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Respondent's Exhibit 1

UNION PROPOSAL

6/24/59—5:30 p.m.

Union proposes that the strike be considered terminated and all pickets will be withdrawn on the basis of:

1. The replacement problem to be resolved by the NLRB or final disposition by Fed. Courts as agreed to earlier today.
2. Union agree to Maintenance of Membership proposal as agreed to earlier today.
3. In the case of Gerald Grafius, it will be resolved by the Court as proposed by the Company.

On the four (4) other discharged employees, that further discussion will be held at a later date with the understanding being that in the case of Edward Karpinski and Val Skiba that disciplinary layoff should not be more than ninety (90) days.

It is understood that the Company will provide the Union with all of the necessary information that it seeks on job openings, replacements and other matters pertinent to getting the people back to work.

It is further understood that all people who have been replaced will be considered as laid-off employees.

It is further agreed that a moratorium will take place on the granting of any additional seniority to anyone who may return to work while this proposal is being considered.

*Respondent's Exhibit 12.***Respondent's Exhibit 12**

EMPLOYEES WORKING ON PRODUCTION OR MAINTENANCE
JOBS DURING THE STRIKE.—BEGINNING WITH WEEK OF
FIRST REPLACEMENTS

<u>Week Ending</u>	<u>Clerical & Other</u>	<u>Permanent Replacement New Employee</u>	<u>Temporary Replacement New Employee</u>	<u>Laid Off Employee</u>	<u>Permanent Replacement</u>	<u>Returning Strikers</u>	<u>Total</u>
5- 4-59	140	0	0	0	0	0	140
5-11-59	140	1	0	23	1	1	165
5-18-59	140	1	0	32	4	4	177
5-25-59	140	8	0	39	5	5	192
6- 1-59	140	18	0	39	8	8	205
6- 8-59	140	34	35	47	23	23	279
6-15-59	140	43	58	59	87	87	387
6-22-59	140	57	58	70	125	125	450

*Respondent's Exhibit 13.***Respondent's Exhibit 13****ERIE RESISTOR CORPORATION****Electronics Division—Bargain Unit Employees**

	Total	# Hourly	# Non- Bargaining Unit	Bargaining Unit
Week of June 29, 1959	435		77	358
" " July 6 "	435		72	363
" " July 13 "	433		68	365
" " July 20 "	435		71	364
" " July 27 "	420		58	362
" " Aug. 3 "	432		58	374
" " Aug. 10 "	434		69	365
" " Aug. 17 "	431		68	363
" " Aug. 24 "	442		70	372
" " Aug. 31 "	452		68	384
" " Sept. 7 "	503		77	426
" " Sept. 14 "	507		75	432
" " Sept. 21 "	515		73	442
" " Sept. 28 "	512		71	441
" " Oct. 5 "	506		72	434
" " Oct. 12 "	495		74	421
" " Oct. 19 "	491		72	419
" " Oct. 26 "	490		72	418
" " Nov. 2 "	496		72	424
" " Nov. 9 "	464		69	395
" " Nov. 16 "	455		66	389
" " Nov. 23 "	463		68	395
" " Nov. 30 "	442		66	376
" " Dec. 7 "	440		63	377
" " Dec. 14 "	433		64	369
" " Dec. 21 "	436		63	373
" " Dec. 28 "	399		59	340

Respondent's Exhibit 13.

	Total # Hourly	# Non- Bargaining Unit	Bargaining Unit
Week of Jan. 4, 1960	345	37	308
" " Jan. 11 "	345	33	312
" " Jan. 18 "	319	32	287
" " Jan. 25 "	298	30	268
" " Feb. 1 "	295	29	266
" " Feb. 8 "	291	29	262
" " Feb. 15 "	290	28	262
" " Feb. 22 "	288	28	260
" " Feb. 29 "	281	29	252
" " March 7 "	286	30	256
" " March 14 "	286	30	256
" " March 21 "	284	30	254
" " March 28 "	287	29	258
" " April 4 "	295	30	265
" " April 11 "	280	30	250
" " April 18 "	278	30	248
" " April 25 "	268	28	240

*General Counsel's Exhibit 1.***General Counsel's Exhibit 1****COMPLAINT AND NOTICE OF HEARING**

It having been charged by International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO, herein termed the Union, that Erie Resistor Corporation, herein termed the respondent, has engaged in, and is now engaging in, unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein termed the Act; the General Counsel of the National Labor Relations Board, herein termed the Board, on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing, pursuant to Section 10 (b) of the Act, and Section 102.15 of the Board's Rules and Regulations, Series 8.

1. A true copy of the original charge filed July 21, 1959, by the Union was duly served by registered mail on Respondent on July 21, 1959. A true copy of the First Amended Charge filed July 23, 1959, by the Union was duly served on Respondent by registered mail on July 23, 1959. A true copy of the Second Amended Charge filed September 11, 1959, by the Union was duly served by registered mail on Respondent on September 14, 1959. A true copy of the Third Amended Charge filed April 1, 1960, by the Union was duly served by registered mail on Respondent on April 1, 1960.

2. Respondent is, and has been at all times material hereto, a Corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania, engaged in the manufacture, distribution and industrial sale of electronics and plastic products. Re-

General Counsel's Exhibit 1.

spondent's principal office is located in Erie, Pennsylvania, and it maintains and operates manufacturing facilities in several states of the United States. During the past twelve month period the Respondent at its Erie, Pennsylvania, facilities, shipped products directly to points outside the Commonwealth of Pennsylvania of a value in excess of \$50,000.00.

3. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

4. From on or about March 1, to on or about June 24, 1959, employees of the Respondent employed at its Erie facilities engaged in a strike.

5. The unit involved herein as set forth below constitutes an appropriate unit for purposes of collective bargaining within the meaning of Section 9 (a) of the Act:

All production and maintenance employees at Respondent's Erie, Pennsylvania, plants, excluding clerical employees, office employees, Engineering Department employees, Accounting Department employees, Sales Department employees, Personnel Department employees, time study employees, expeditors, laboratory employees, nurses, quality control inspectors, timekeeping employees, executives, guards, professional employees and supervisors as defined in the Act.

6. The Union, having been duly designated and selected by a majority of Respondent's employees in the unit described in paragraph 5 above, has been, and is now, the exclusive bargaining representative of the aforesaid employees in the designated unit within the meaning of Section 9 (a) of the Act.

7. Since on or about January 26, 1959, and at all times thereafter, the Union, by its officers, agents and representatives, has requested the Respondent to bargain collectively with it as exclusive representative of the employees described in paragraph 5 above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

8. Since on or about May 1, 1959, and thereafter, the Respondent, by its officers, agents and representatives, has failed and refused to bargain collectively in good faith with the Union as exclusive representative of the employees in the unit described in paragraph 5 above, more specifically by:

- (a) Unilaterally altering the relative seniority of its employees, including strikers.
- (b) Insistence upon the establishment of a discriminatory seniority policy as a condition precedent to agreement upon a collective bargaining contract with the Union.
- (c) Refusal to provide the Union with a list of replaced strikers, as requested by the Union.
- (d) Engaging in dilatory and delaying tactics and by shifting positions during collective bargaining.
- (e) Permitting inadequate time for consideration by the Union of the Respondent's contract proposals.
- (f) Refusing to attend negotiating sessions unless arranged through the Federal Mediation and Conciliation Service.

General Counsel's Exhibit 1.

9. On or about May 27, 1959, Respondent promulgated and has to date maintained a seniority policy by which its employees, who engaged in the strike described in paragraphs 4 and 11 herein, were deprived of their proper seniority status or rank.

10. On or about May 27, 1959, Respondent promulgated and has to date maintained a discriminatory seniority policy by which its employees who engaged in the strike described in paragraphs 4 and 11 herein, were deprived of their proper seniority status or rank because they engaged in said strike, because of, and for the purpose of, discouraging membership in, sympathy for, and activities on behalf of the Union, and because they engaged in and for the purpose of discouraging other concerted and Union activities for the purpose of collective bargaining and other mutual aid and protection.

11. The strike described in paragraph 4 herein was from on or about May 11, 1959, and thereafter, prolonged and continued by the unfair labor practices described in paragraphs 8, 9 and 10 herein.

12. On and after the conclusion of the strike described in paragraphs 4 and 11 herein, on or about June 24, 1959, the employees named in Schedule A attached made an unconditional offer to return to their former or substantially equivalent positions of employment.

13. On or about June 24, 1959, and at all times thereafter, Respondent did fail and refuse, and continues to fail and refuse, to reinstate the employees listed in said Schedule A to their former or substantially equivalent positions of employment because they engaged in the strike described in paragraphs 4 and 11 above, be-

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cause of the seniority policy described in paragraphs 9 and 10 above, because of and for the purpose of discouraging membership in, sympathy for, and activities on behalf of the Union, and because they engaged in and for the purpose of discouraging other concerted activities for the purpose of collective bargaining and other mutual aid and protection.

14. Respondent has, since on or about June 24, 1959, discriminatorily laid off divers employees because of the seniority policy described in paragraphs 9 and 10 above, because they engaged in the strike described in paragraphs 4 and 11 above, because of and for the purpose of discouraging membership in, sympathy for, and activities on behalf of the Union, and because they engaged in and for the purpose of discouraging other concerted activities for the purpose of collective bargaining and other mutual aid and protection.

15. By the acts described in paragraphs 9, 10, 13 and 14 above, and by each of the said acts, Respondent did discriminate, and is now discriminating, in regard to hire, tenure, terms and conditions of employment and thereby did engage in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

16. By the acts described in paragraph 8 above, and by each of the said acts, Respondent did engage in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

17. By the acts described in paragraphs 8, 9, 10, 13 and 14 above, and by each of the said acts, Respondent did interfere with, restrain and coerce, and is now

General Counsel's Exhibit 1.

interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby Respondent did engage in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

18. The activities of Respondent, as set forth in paragraphs 8, 9, 10, 13 and 14 above, occurring in connection with the operations of Respondent, described in paragraph 2 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and tend to lead to labor disputes obstructing commerce and the free flow of commerce.

19. The aforementioned acts of Respondent, as set forth in paragraphs 8, 9, 10, 13 and 14 above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) (3) and (5) and Sections 2 (6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 25th day of April, 1960, at ten o'clock in the forenoon, Daylight Saving Time, in the Grand Jury Room, United States Court House, Erie, Pennsylvania, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National

General Counsel's Exhibit 1.

Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

DATED AT Pittsburgh, Pennsylvania, this 7th day of April, 1960.

HENRY SHORE
Regional Director, Sixth Region
NATIONAL LABOR RELATIONS BOARD
2107 Clark Building
Pittsburgh 22, Pennsylvania

ANSWER

ERIE RESISTOR CORPORATION, respondent above named, answers the Complaint filed herein as follows:

1. The allegations of paragraph 1 of the Complaint are admitted.
2. The allegations of paragraph 2 of the Complaint are admitted.
3. The allegations of paragraph 3 of the Complaint are admitted.
4. The allegations of paragraph 4 of the Complaint are denied. Respondent avers that the Union engaged in an economic strike at the Erie plant beginning at about midnight on March 31, 1959, and that the strike continued until at least June 25, 1959.
5. The allegations of paragraph 5 of the Complaint are denied. Whether or not the unit as described is appropriate is a conclusion of law requiring no answer, but

General Counsel's Exhibit 1.

respondent avers that the circumstances that existed when the described unit was certified have changed substantially since that time.

6. Whether or not the Union is in fact the exclusive representative of the employees in the unit described depends upon the answer to divers legal questions. Respondent is without knowledge of the truth or falsity of the allegations as to any facts contained in paragraph 6 of the Complaint. However, respondent admits that it has bargained with the Union and entered into two collective agreements since the times mentioned in the Complaint.

7. The allegations of paragraph 7 of the Complaint are denied. Respondent avers that on numerous occasions, both prior to and since January 29, 1959, the Union requested that respondent bargain, and that respondent did bargain, but avers that the allegations of the Complaint are so vague and general that they are inaccurate.

8. The allegations of paragraph 8 of the Complaint are denied. Specifically it is denied that since on or about May 1, 1959, and thereafter, the respondent, by its officers, agents and representatives, has failed and refused to bargain collectively in good faith with the Union as exclusive representative of the employees in the unit described in paragraph 5 of the Complaint, more specifically by:

- (a) Unilaterally altering the relative seniority of its employees, including strikers.
- (b) Insistence upon the establishment of a discriminatory seniority policy as a condition precedent to agreement upon a collective bargaining contract with the Union.

General Counsel's Exhibit 1.

- (c) Refusal to provide the Union with a list of replaced strikers, as requested by the Union.
- (d) Engaging in dilatory and delaying tactics and by shifting positions during collective bargaining.
- (e) Permitting inadequate time for consideration by the Union of the respondent's contract proposals.
- (f) Refusing to attend negotiating sessions unless arranged through the Federal Mediation and Conciliation Service.

9. Respondent denies that on or about May 27, 1959, respondent promulgated and has to date maintained a seniority policy by which its employees, who engaged in the strike described in paragraphs 4 and 11 of the Complaint, were deprived of their proper seniority status or rank.

10. Respondent denies that on or about May 27, 1959, respondent promulgated and has to date maintained a discriminatory seniority policy by which its employees who engaged in the strike described in paragraphs 4 and 11 of the Complaint were deprived of their proper seniority status or rank because they engaged in said strike, because of, and for the purpose of, discouraging membership in, sympathy for, and activities on behalf of the Union, and because they engaged in activities for the purpose of collective bargaining and other mutual aid and protection.

11. Respondent denies that the strike described in paragraph 4 of the Complaint was from on or about May 11, 1959, and thereafter, prolonged and continued by the

General Counsel's Exhibit 1.

unfair labor practices described in paragraphs 8, 9 and 10 of the Complaint.

12. Respondent denies that on and after the conclusion of the strike described in paragraphs 4 and 11 of the Complaint, on or about June 24, 1959, the employees named in Schedule A, attached to the Complaint, made an unconditional offer to return to their former or substantially equivalent positions of employment.

13. Respondent denies that on or about June 24, 1959, and at all times thereafter, respondent did fail and refuse, and continues to fail and refuse, to reinstate the employees listed in said Schedule A to their former or substantially equivalent positions of employment because they engaged in the strike described in paragraphs 4 and 11 of the Complaint, because of the seniority policy described in paragraphs 9 and 10 of the Complaint, because of and for the purpose of discouraging membership in, sympathy for, and activities on behalf of the Union, and because they engaged in and for the purpose of discouraging other concerted activities for the purpose of collective bargaining and other mutual aid and protection.

14. Respondent denies that respondent has, since on or about June 24, 1959, discriminatorily laid off divers employees because of the seniority policy described in paragraphs 9 and 10 of the Complaint, because they engaged in the strike described in paragraphs 4 and 11 of the Complaint, because of and for the purpose of discouraging membership in, sympathy for, and activities on behalf of the Union, and because they engaged in and for the purpose of discouraging other concerted activi-

General Counsel's Exhibit 1.

ties for the purpose of collective bargaining and other mutual aid and protection.

15. Respondent denies that by the acts described in paragraphs 9, 10, 13 and 14 of the Complaint, and by each of the said acts, respondent did discriminate, and is now discriminating, in regard to hire, tenure, terms and conditions of employment and thereby did engage in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

16. Respondent denies that by the acts described in paragraph 8 of the Complaint, and by each of the said acts, respondent did engage in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

17. Respondent denies that by the acts described in paragraphs 8, 9, 10, 13 and 14 of the Complaint, and by each of the said acts, respondent did interfere with, restrain and coerce, and is now interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby respondent did engage in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

18. Respondent denies that the activities of respondent, as set forth in paragraphs 8, 9, 10, 13 and 14 of the Complaint, occurring in connection with the operations of respondent, described in paragraph 2 of the Complaint, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and tend to lead to labor disputes obstructing commerce and the free flow of commerce.

General Counsel's Exhibit 1.

19. Respondent denies that the aforementioned acts of respondent, as set forth in paragraphs 8, 9, 10, 13 and 14 of the Complaint, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1), (3) and (5) and Sections 2 (6) and (7) of the Act.

WHEREFORE, respondent prays that the Complaint be dismissed in its entirety.

JOHN G. WAYMAN

REED SMITH SHAW & MCCLAY

747 Union Trust Building
Pittsburgh, Pennsylvania

Attorneys for Erie Resistor
Corporation, Respondent

Of Counsel:

Irving O. Murphy
615 Masonic Building
Erie, Pennsylvania

Dated: April 28, 1960.

*General Counsel's Exhibit 2.***General Counsel's Exhibit 2****ERIE RESISTOR CORPORATION****Summary of Meetings with Local 613,
IUE-AFL-CIO****Local Union Committee:**

- | | |
|------------------------|----------------------|
| 1. Edward Borgonaro | 6. Samuel Fargiorgio |
| 2. Edward Karpinski | 7. William Parker |
| 3. Ethel Guienan | 8. Paul Bacik |
| 4. Milton Sipple | 9. Fred Carpen |
| 5. Homer Gindlesperger | |

Company Committee:

- | | |
|-------------------|-------------------|
| 1. Gordon Ferrell | 4. Lewis Shioleno |
| 2. George Schau | 5. Ray Bertone |
| 3. Edmund Willis | |

Number	Date	Hour	Persons Present
1.	2/10/59	9:30 A.M.- 12:20 P.M.	Local Union Committee; International Representatives — Charles Cope- land; Joseph Considine, and Company Committee
2.	2/17/59	9:30 A.M.- 12:00 Noon	Local Union Committee; Company Committee
3.	2/19/59	9:00 A.M.- 12:00 Noon	Local Union Committee; Company Committee, ex- cept Edmund Willis
4.	2/23/59	9:00 A.M.- 12:00 Noon	Local Union Committee; Company Committee
5.	2/25/59	9:00 A.M.- 12:20 P.M.	Local Union Committee; Company Committee
6.	2/26/59	9:00 A.M.- 12:00 P.M.	Local Union Committee; Company Committee

General Counsel's Exhibit 2.

<u>Number</u>	<u>Date</u>	<u>Hour</u>	<u>Persons Present</u>
7	3/ 2/59	9:00 A.M.- 12:00 P.M.	Local Union Committee; International representative—Charles Copeland; Company Committee
8	3/ 3/59	9:00 A.M.- 12:00 Noon	Local Union Committee; International representative—Charles Copeland; Company Committee
9	3/ 6/59	8:00 A.M.- 2:00 P.M.	Local Union Committee; International representative—Joseph Considine; Company Committee
10	3/ 9/59	8:00 A.M.- 12:00 P.M.	Local Union Committee; International representative—Joseph Considine; Company Committee
11	3/10/59	8:00 A.M.- 12:15 P.M.	Local Union Committee; International representative—Charles Copeland; Company Committee (Geertson substituted for Shieleno)
12	3/12/59	7:00 A.M.- 12:00 Noon	Local Union Committee; International representatives—Charles Copeland and J. Considine; Company Committee
13	3/13/59	7:00 A.M.- 12:00 Noon	Local Union Committee; International representative—Joseph Considine; Company Committee
14	3/16/59	8:00 A.M.- 12:00 Noon	Local Union Committee; International representative—Joseph Considine; Company Committee; Company Guests — W. Crotty, C. Geertson, H. Herrick, N. Coda

General Counsel's Exhibit 2.

Number	Date	Hour	Persons Present
15	3/17/59	8:00 A.M.- 12:10 Noon	Local Union Committee; International representa- tive—Joseph Considine; Company Committee, ex- cept Edmund Willis and Herrick
16	3/20/59	8:00 A.M.- 12:00 Noon	Local Union Committee; International representa- tive—Joseph Considine; Company Committee; Additional Company re- presentatives: W. Crotty and C. Geertson
17	3/23/59	8:00 A.M.- 12:00 Noon	Local Union Committee; International representa- tive—Joseph Considine; Company Committee
18	3/24/59	7:00 A.M.- 4:10 P.M.	Local Union Committee; International representa- tive—Joseph Considine; Company Committee
19	3/25/59	8:00 A.M.- 4:00 P.M.	Local Union Committee; International representa- tive — Joseph Considine and Charles Copeland; Company Committee
20	3/26/59	8:00 A.M.- 4:30 P.M.	Local Union Committee; International representa- tive—Joseph Considine; Company Committee
21	3/27/59	8:00 A.M.- 11:20 P.M.	Local Union Committee; International representa- tive—Joseph Considine; Company Committee
22	3/31/59- 4/ 1/59	8:00 A.M.- 3/31-10:00 A.M., 4/1	Local Union Committee; International representa- tives—Joseph Considine and Charles Copeland; Company Committee

General Counsel's Exhibit 2.

<u>Number</u>	<u>Date</u>	<u>Hour</u>	<u>Persons Present</u>
23	4/ 8/59	10:00 A.M.- 6:25 P.M.	Federal Mediator, Grover Stainbrook; Local Union Committee; International representative — Joseph Considine; Com- pany Committee
24	4/14/59	10:00 A.M.- 5:00 P.M.	Federal Mediator, Grover Stainbrook; State Medi- ator Michael Prime; Guest—Msgr. Franklin; Local Union Committee; International representa- tive—Charles Copeland; Company Committee
25	4/21/59	10:00 A.M.- 4:00 P.M.	Federal Mediator, Grover Stainbrook; State Medi- ator Michael Prime; Lo- cal Union Committee; International representa- tive — Charles Cope- land; Company Commit- tee
26	4/24/59	10:00 A.M.- 11:30 A.M.-	Federal Mediator, Grover Stainbrook; State Medi- ator Michael Prime; Local Union Committee; International representa- — Charles Copeland; Company Committee
27	4/28/59	9:30 A.M.- 5:00 P.M.	Federal Mediator, Grover Stainbrook; State Medi- ator Michael Prime; International representa- —Charles Copeland; Lo- cal Union Committee; Company Committee

General Counsel's Exhibit 2.

Number	Date	Hour	Persons Present
28	4/29/59	10:00 A.M.- 2:30 P.M.	Federal Mediator, Grover Stainbrook; State Medi- ator, Michael Prime; Local Union Committee; International representa- tive—Charles Copeland; Company Committee
29	5/ 5/59	10:00 A.M.- 12:15 P.M.	Federal Mediator, Grover Stainbrook; Interna- tional representative — Charles Copeland; Local Union Committee; Her- rick
30	5/ 6/59	10:00 A.M.- 11:30 P.M.	Federal Mediator, Grover Stainbrook; Interna- tional representative — Charles Copeland; Local Union Committee; Com- pany Committee
31	5/11/59	7:00 A.M.	Federal Mediator, Grover Stainbrook; State Medi- ator, Michael Prime; Local Union Committee; International representa- tive—Charles Copeland; Company Committee — Grafius (Union)
32	5/13/59	10:00 A.M.- 12:00 P.M. 2:30 P.M. 5:00 P.M.	State Mediator, Michael Prime; Local Union Com- mittee; International repre- sentative — Charles Copeland; Company Committee. At 2:30 P.M. International representa- tives—Roger Coyne, An- gello Colella, and Joseph Considine—Grafius (Un- ion)

General Counsel's Exhibit 2.

Number	Date	Hour	Persons Present
33	5/14/59	10:00 A.M.- 12:00 P.M. 2:00 P.M. } Side Bar 5:00 P.M. } Meeting	Federal Mediator, Grover Stainbrook; State Mediator Michael Prime; Local Union Committee; International representatives—Copeland, Coyne, Colella; Company Committee—Grafius (Union)
34	5/18/59		(off the record)
35	5/22/59	10:00 A.M.- 12:00 Noon	Federal Mediator, Grover Stainbrook; State Mediator, Michael Prime; Local Union Committee; International representatives—Copeland, Coyne, Colella; Company Committee
36	5/23/59	9:30 A.M.-	Local Union Committee; International representatives Copeland, Coyne; State Mediator, Michael Prime; Company Committee—Grafius (Union)
37	5/28/59	10:00 A.M.- 12:00 P.M. 2:30 P.M. 4:30 P.M.	Federal Mediator, Grover Stainbrook; State Mediator, Michael Prime; Local Union Committee, plus "Shy" Jankowski; International representatives—Copeland, Coyne, Colella; Company Committee—Grafius (Union)
38	5/29/59	2:00 P.M. 3:11 P.M.	Local Union Committee; International representatives—Copeland and Colella; Company Committee

General Counsel's Exhibit 2.

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<u>Number</u>	<u>Date</u>	<u>Hour</u>	<u>Persons Present</u>
39	6/ 2/59	10:00 A.M.- 4:00 P.M.	Federal Mediator, Grover Stainbrook; State Medi- ator, Michael Prime; C o m p á n y represen- tatives—Ferrell, Shieleno, Bertone; International representative — Colella State Mediator, Michael Prime; International re- presentative — Colella; Company Committee
40	6/ 3/59		
41	6/ 4/59		Federal Mediator, Grover Stainbrook; State Medi- ator, Michael Prime; C o m p á n y represen- tatives—Ferrell, Shieleno; International representative— Colella. At 3:30 P. M. Local Union Commit- tee men Bordonaro, Kar- pinski and Guianan were added
42	6/ 5/59		Federal Mediator, Grover Stainbrook; Company representatives — Fer- rell, Shieleno; Interna- tional representative — Colella; Local U n i o n Committee representa- tives — Bordonaro, Kar- pinski, Guianen
43	6/11/59		Federal Mediator, Grover Stainbrook; State Medi- ator, Michael Prime; Com- pany representatives — Ferrell, Schau, Bertone; International representa- tives—Coyne, Copeland; Local Union Committee representatives — Bor- donaro, Guianen

General Counsel's Exhibit 2.

<u>Number</u>	<u>Date</u>	<u>Hour</u>	<u>Persons Present</u>
44	6/12/59	1:30 P.M. 3:25 P.M.	Federal Mediator, Grover Stainbrook; State Mediator, Michael Prime; Company representatives — Ferrell, Schau, Bertone; International representative — Coyne; Local Union Committee
45	6/13/59	2:00 P.M. 3:25 P.M.	Federal Mediator, Grover Stainbrook; State Mediator, Michael Prime; Local Union Committee representatives — Guienan, Grafius, Fargiorgio, Bordonaro, Karpinski, Gindlesperger; International representative — Copeland; Company representatives — Ferrell, Schau, Bertone
46	6/16/59	3:00 P.M. 5:00 P.M.	Federal Mediator, Grover Stainbrook; State Mediator, Michael Prime; Company representatives — Schau, Ferrell, Shieleno, Bertone; Local Union Committee representatives — Karpinski, Guienan, Parker, Fargiorgio, Bacik; International representatives — Copeland, Coyne, Colella
47	6/23/59	10:00 A.M.- 5:05 P.M.	Federal Mediator, Grover Stainbrook; State Mediator Michael Prime; Company representatives — Ferrell, Schau, Shieleno, Bertone; Local Union Committee representative — Bordonaro; International representative — Coyne

General Counsel's Exhibit 2.

<u>umber</u>	<u>Date</u>	<u>Hour</u>	<u>Persons Present</u>
48	6/24/59	11:00 A.M.- 5:40 P.M.	State Mediator, Michael Prime; Local Union Committee; International representatives — Coyne, Colella, Fagan; Company representatives — Ferrell, Schau, Shioleno, Bertone
49	7/ 7/59	10:00 A.M.- 3:40 P.M.	Federal Mediator, Grover Stainbrook; State Mediator, Michael Prime; International representatives — Copeland, Colella, McHugh; Local Union Committee representatives — Bordonaro, Guianen, Karpinski, Fargiorgio, Carpen, Gindlesperger, Bacik; Company representatives — Ferrell, Schau, Shioleno, Bertone
50	7/ 8/59	2:00 P.M.	Federal Mediator, Grover Stainbrook; State Mediator, Michael Prime; International representatives — Copeland, Colella; Local Union Committee representatives — Bordonaro, Guianen, Karpinski, Fargiorgio, Carpen, Gindlesperger, Bacik; Company representatives — Ferrell, Schau, Shioleno, Bertone

General Counsel's Exhibit 2.

<u>Number</u>	<u>Date</u>	<u>Hour</u>	<u>Persons Present</u>
51	7/15/59	10:00 A.M.	Federal Mediator, Grover Stainbrook; Company representatives -- Ferrell, Bertone, Ehrman; Local Union Committee representatives — Bordonaro, Guienan, Karpinski, Far ^o giorgio, Bacik
52	7/17/59		Company representatives — Ferrell, Ehrman, Bertone; International representative Colella; Local Union Committee representatives — Bordonaro, Karpinski, Guienan

**General Counsel's Exhibit 3
REPLACEMENT LISTING
REPLACED EMPLOYEES**

<i>Name</i>	<i>Replacement Date</i>
Ed Gorski	5-11-59
Ida Cianflone	5-11-59
Frances Simon	5-12-59
Norbert Romanowicz	5-13-59
Sophie Konecko	5-13-59
Sara McKinney	5-13-59
Adella Miraldi	5-13-59
Pearl Mello	5-14-59
Adele Graves	5-14-59
Joe Janulewksi	5-14-59
Wilford Hamm	5-14-59
David Higham	5-15-59
Danny Camino	5-15-59
June Niedrick	5-18-59
Vera Falderoff	5-18-59
Sam Baker	5-18-59
Edward Bordonaro	5-18-59
Norbert Grotkowski	5-18-59
Julia Sulkowski	5-20-59
Charles Jenks	5-28-59
Mary Leonardi #1103	5-28-59
William Cahill	5-28-59
John Hammer	5-28-59
Raymond Wycheck	5-28-59
James Paterson	5-29-59
Bertha Cline	6- 1-59
Joshua Martin	6- 1-59
Minnie Aiken	6- 1-59
Walter Brown	6- 5-59
Irene Bearce	6- 5-59

General Counsel's Exhibit 3.

<i>Name</i>	<i>Replacement Date</i>
Dorothy Schaffer	6- 5-59
Martin Denial	6- 6-59
Laura Carlisle	6- 8-59
Charles Peterson	6- 8-59
Francis McCracken	6- 8-59
Alice Krolak	6- 8-59
John DiMattio	6- 8-59
Rosalie Crosby	6- 9-59
Kathleen Gasper	6- 9-59
Robert DeFonzo	6- 9-59
Morris Schneider	6- 9-59
William Parker	6- 9-59
Edith Burkett	6- 9-59
Eila Mayes	6- 9-59
Savina Langley	6-10-59
Roland Myers	6-10-59
Joe Haibach	6-10-59
William Erpenback	6-10-59
Rose Sopp	6-10-59
Dorothy Martin	6-10-59
Elmer Hunt	6-11-59
Henrietta Thomas	6-11-59
Mary Wittenburg	6-11-59
Harry Layne	6-12-59
William Ripple	6-13-59
Paul Bacik	6-15-59
Ann Lunger	6-15-59
Ethel Guianen	6-16-59
Mildred Horton	6-16-59
Flora Lechner	6-16-59
Vivian Scriven	6-16-59
Roma Bolakowska	6-16-59
Charlene Holman	6-17-59
Ettore Presogna	6-17-59

General Counsel's Exhibit 3.

<i>Name</i>	<i>Replacement Date</i>
Carl Norman	6-17-59
Jane Platz	6-17-59
Al Fiscus	6-17-59
Cyril Weithman	6-18-59
Rozene Jones	6-18-59
Lizetta Massello	6-18-59
Howard Wilson	6-18-59
Elsie Ah!brandt	6-18-59
John Alexander	6-18-59
Arthur Knepley	6-18-59
Bertha Szymanski	6-18-59
Mary Lecorchick	6-18-59
Frances McDonald	6-18-59
Virginia Weber	6-18-59
Gertrude Pollard	6-19-59
Marion Lindberg	6-19-59
Albennie Ross	6-19-59
Elmer Jones	6-19-59
Charlotte Steward	6-19-59
Mary Pomorski	6-19-59
Kathryn Vargo	6-19-59
Eleanor Barnett	6-19-59
Evelyn Petrigni	6-19-59
Frank Sullivan	6-19-59
Delores DiSanti	6-19-59
Leonard Zielinski	6-19-59
Jane Kriner	6-22-59
Kay Christie	6-22-59
Tom Capito	6-22-59
Joe Kitza	6-22-59
Jodie Lee	6-22-59
Frank Zielonis	6-22-59
Mary Frith	6-22-59
Dorothy Strick	6-22-59

General Counsel's Exhibit 3.

<i>Name</i>	<i>Replacement Date</i>
Marie Geisler	6-22-59
Dorothy Kenzora	6-22-59
Dorothy Rose	6-22-59
Edith Chizmadia	6-22-59
Florence Daley	6-22-59
Carl Crocoll	6-23-59
Madelyn Payha	6-23-59
Madison Pollard	6-23-59
Elizabeth Koen	6-23-59
Dan McAdoo	6-23-59
Al Szuchmanski	6-23-59
Helen Larson	6-23-59
Rose Sirian	6-23-59
Mary Cacchione	6-23-59
Helen Yuhas	6-23-59
Clara Kulig	6-23-59
Mildred Moskot	6-23-59
Rose Riazzi	6-23-59
Alice Battles	6-24-59
Mary Parker	6-24-59
William Balkovic	6-24-59
Pedro Fernandez	6-24-59
Robert Seth	6-24-59
Pearl Kobylinski	6-24-59
Kenneth Mattson	6-24-59
Anthony Bucceri	6-24-59

*General Counsel's Exhibit 5B.***General Counsel's Exhibit 5 B**

Erie, Pa., Times, Monday, May 25, 1959

\$1,000 REWARD!

A \$1,000.00 reward will be paid by Erie Resistor Corporation for information hereafter furnished leading directly to the arrest and conviction of the first person or persons found guilty of secret and underhanded assault, vandalism or anonymous threats directed against any presently working Erie Resistor employee.

ERIE RESISTOR CORP.

G. RICHARD FRYLING, President

A Report to the Community on the Erie Resistor Strike

Seventy-four days have elapsed since officers of IUE Local 613 called a strike at four local plants of the Erie Resistor Corporation.

The present and future economic loss to the Company has been considerable. Lack of pay checks has resulted in real hardship for many Erie Resistor employees and virtually every business in the Erie community has been hurt by the loss of this portion of Erie Resistor's payrolls . . . which since the strike started on March 31, approaches one-half million dollars.

WHY DID THIS HAVE TO HAPPEN? WHY DOES IT STILL CONTINUE?

In previous years the company reluctantly gave in to unrealistic demands of the Union when it struck or threatened to strike. This year after the Union had called the strike there was no choice but to resist to the bitter end a contract provision which was gradually strangling the company's Erie production and reducing the number of jobs available. This was the provision which permitted employees, however unskilled or untrained, to "bump" other at-work employees from their jobs. This "bumping" caused little hardship when Erie Resistor was a small company with simple product lines and little competition. With today's highly complex products and keen competition for customers, unrestrained large-scale "bumping" had created problems of re-training which were making it impossible to meet the price and delivery requirements of our customers.

Likewise, the Company had no choice but to refuse the Union's demand for a wage increase. The business of the Company in Erie had been such that more than 400 members of the bargaining unit have long been on lay-off and the most vigorous effort was needed to get enough orders to keep the 450 then-at-work members on their jobs.

"A strike was the last thing in the world Erie Resistor wanted . . . or could afford. Between February 21 and March 31 Erie Resistor had 22 meetings with Union negotiators . . . the last of these a 26-hour talk which was still in session when Union officials called the strike. At that point, Federal and State mediators were called in to help speed the end of the strike. From April 1 to June 5, nineteen meetings were held with the able and skilled help of these experienced mediators.

On June 5th . . . after the employees, the Community and the Company had suffered nine long weeks of strike . . . Local 613 and Company negotiators reached agreement on all issues which were present at the beginning of the strike.

The significant point is that these same terms were available to the Union long before March 31st. If their acceptance required nine weeks of debate,

consequences were thoroughly discussed in negotiation meetings of May 6 presided over by the Federal Mediator.

By accepting on May 6 the proposals it DID accept 'on June 5, Union negotiators could have spared Union members and the Company all of the problems that have arisen since then.'

Instead, on the morning of May 7, there was mass picketing and violence, in flagrant violation of the specific order of the court. Individuals who had expressed a desire to come to work, were threatened . . . with fines, suspension or expulsion. There was a sharp increase in actual and implied threats . . . and in violence against the persons and properties of those who had come to work or who had made known their desire to do so. Rightly or wrongly, these deliberate acts of terrorism were regarded by the individuals involved as instruments of the Union leaders' policy. Certainly, they discouraged the legal right of free choice for many individuals who wanted to come to work.

At the same time, Union spokesmen issued frequent public statements that negotiations were "only inches away from settlement". Whether these statements were made in good faith, only the Union leaders can say. Certainly, they could have accepted . . . before March 31st or any time thereafter . . . the same proposals they DID accept on June 5. The timing of these "inches away" announcements, however, strongly suggests that they were deliberately designed to discourage members from returning to work. In essence, they asked anyone who wanted to come to work, "Why risk bad trouble for a few days' pay?"

Under these circumstances the Company had no choice but to exercise its legal right to assure employees that coming to work of their own free choice WOULD mean more than a "few days' pay" . . . that the end of the strike would NOT mean the end of their jobs. The Company has given that assurance to all who have come to work under these circumstances AND IT WILL CONTINUE TO DO SO in good faith within its legal rights.

3. Out of respect for the personal rights of employees now at work, the Company can no longer make Union membership a requirement.

*General Counsel's Exhibit 5D.***General Counsel's Exhibit 5 D**

Erie Morning News, Wed., June 17, '59

RESISTOR, UNION TO MEET JUNE 23

Representatives of Erie Resistor Corp. management and the striking Local 613, International Union of Electrical Workers (AFL-CIO) are reported "still far apart" on three remaining issues which are preventing settlement of the 76-day-old strike following an all-day negotiating session Tuesday.

Another meeting will be held June 23 between union and management officials with Federal mediator, Grover Stainbrook and State Mediator Michael Prime.

CLASSIFIED DISPLAY

CLASSIFIED DISPLAY

WOMEN WANTED

for steady work in good surroundings. Liberal wages, pensions and other fringe benefits. No previous experience required. Opportunity to learn and earn on the job. Applicants should be over 18 years of age, with high school education. Interviews will be conducted at our downtown office. For appointment, phone 4-1382 mornings from 9 till noon.

ERIE RESISTOR CORPORATION

*General Counsel's Exhibit 6.***General Counsel's Exhibit 6****ERIE RESISTOR CORPORATION**

*Pioneers in the Development of Electronics
and Plastics*

644 West 12th Street, Erie, Pa.

Phone 2-1481

June 10, 1959

To All Employees of Erie Resistor Corporation
and Members of IUE Local 613

On March 31 the officials of Local 613 IUE called a strike at the Erie Resistor Corporation. Today, nine weeks later, they continue this strike.

On June 5 all the issues which had caused the strike were settled on basically the same terms that the Company had offered prior to March 31. Nine weeks of lost wages for what?

Now only the issues caused by the Union officers' conduct of the strike remain to be settled. These too can be resolved without another day's lost wages.

Five members of Local 613 have committed unprovoked assaults on their fellow employees. One woman chased a young girl half a block and then struck her. One man knocked one Company official to the ground and then struck another official when he attempted to intervene. This sort of conduct cannot be condoned on the picket line or elsewhere, strike or no strike. Hence, the

General Counsel's Exhibit 6.

five employees involved have been discharged. The Union negotiators insist that these former employees be re-hired. They have also appealed to the National Labor Relations Board in an attempt to have it order reinstatement of these employees. The Company has agreed to abide by the decision of the Federal authorities. Yet the Union leadership is unwilling to accept whatever the government decides. The Union insists on continuing the useless strike to enforce its demands for reinstatement of these five discharged employees.

Violence on the picket lines and threats by some Union officers against those who wished to exercise their legal and moral right to come to work have intimidated and coerced these men and women. The Company had a duty to its employees, to its customers, to its stockholders, and to the community to resume full production. In order to get employees to withstand such threats and coercion by some Union officials, it was necessary to grant non-strikers assurance that they would not be thrown out of work when the strike ends. In order to make such an assurance it became necessary to grant each employee affected sufficient seniority to protect him or her against the severe cut-back which is expected following the conclusion of the strike. Under these circumstances, the people who come to work . . . as is their legal and moral right . . . are entitled to some assurance that their jobs will not end when the strike is settled. The granting of additional seniority is an accepted method of providing job assurance; this policy will continue to apply to all who come to work under these circumstances. Since this useless strike has caused the loss of many orders, an employee will need in the

General Counsel's Exhibit 6.

neighborhood of twenty years seniority to be assured a job during the weeks which follow the strike.

Had the Union not used coercion, violence and threats, this offer of additional seniority protection would not have become necessary. But even this issue need not cause the continuation of a useless strike. Again the Union has appealed to the National Labor Relations Board and again the Company will abide by the ultimate rulings of the Federal Government. Is the Union afraid to trust the United States Government? Would it prefer to rely on the effects of a useless strike?

Lastly, the Union leaders choose to continue the strike to enforce their demands for a Union Shop. A Union shop means one where every employee must belong to the Union in order to keep his job. The Union has abused the privileges of a Union shop by using it as a threat. By letter, it has threatened to fine, suspend or expel any member who exercises his or her own free choice to come to work. It has suggested that under the Union shop anyone so expelled will be discharged. This sort of illegal abuse of Union shop apparently can be prevented only by denying the Union the weapon of Union shop.

Obviously the Compay cannot agree to any such illegal plan to fire people just because they choose to work. This issue, too, need not continue a useless strike. If the Union truly represents the desires of the employees, then the loss of the Union shop should not mean the loss of any members. On the other hand, if some employees do not wish to be forced into the Union, the Union has only its past conduct to blame. If the Union

General Counsel's Exhibit 6.

and its members feel that forcing all employees into the Union is worth continuing this useless strike, that is their privilege.

There has been able direction by federal and state mediators through these negotiations. The mediators are men of experience and know-how in these matters so vital to us all. Your Company believes their continued handling of any future negotiations is in the intelligent best interests of all concerned.

From the very beginning of the contract talks, your Company has made every effort to avert a strike and will continue to work for an equitable settlement.

Yours very truly,

ERIE RESISTOR CORPORATION

G. RICHARD FRYLING

G. Richard Fryling, President

General Counsel's Exhibit 7.

General Counsel's Exhibit 7

ERIE RESISTOR CORPORATION

*Pioneers in the Development of
Electronics and Plastics*

644 West 12th Street, Erie, Pa.

Phone: 2-1481

May 3, 1959

To all members Erie Resistor Corporation
Local 613 I.U.E. C.I.O.:

We have written you on several occasions. We have done our best to keep you informed.

We have bargained in good faith for months to try to solve the situation brought upon all of us by the Union. We tried to find a way for you to continue to work and get your regular pay. This could have been done even while we negotiated—but during negotiations the Union pulled you off your job at the stroke of midnight at the contract's expiration on March 31st.

Now we want to tell you that it is our duty to you, to our customers, to our stockholders, and to our community, to return the company to full production without further delay. The law provides that the company may fill the job of a striker with a permanent replacement. Permanent replacement means an end to the job and job rights of the employee replaced.

We want to inform you that starting May 7th we are going to obtain replacements. You will have your right to your job only until you are replaced but not after that.

General Counsel's Exhibit 11.

Whatever decision you make to exercise your rights to a job is your own. We cannot and will not tell you what you ought to do. But we tell you what we must do to save our business and that is to return to full production.

Very truly yours,

G. RICHARD FRYLING,

G. Richard Fryling, President

ERIE RESISTOR CORPORATION

General Counsel's Exhibit 11

626 B June 26, 1959

We hand you herewith the Company's proposal of June 25, 1959. We were about to submit this to you when we received your telegram at 3:30 P.M. Obviously, Points 7 and 8 are no longer relevant. The remaining points state the Company's present position.

In answer to your wire of June 26, 1959, we must reiterate that these striking employees eligible for reinstatement will be called back, not jointly, but by the Company in an orderly manner as business warrants.

It must be further understood that employees will return to work without a contract. Until such time as a final contract is agreed to by both parties, there are no final agreements on any issues. The Company will, of course, continue to be fair to all returning employees as evidenced by the treatment accorded to those already back to work.

General Counsel's Exhibit 11.

The Company received notice of your termination of the strike at 3:30 P.M., June 25th, and considers that hour as the end of the strike.

COMPANY'S PROPOSAL

June 25, 1959

We reject the Union's package proposal of June 24th. In return we make the following package proposal.

1. Agreement on Maintenance of Membership.
2. The Company will continue its replacement policy announced May 27, 1959 and reserves all of its legal rights to sustain this policy.
3. The people who have been replaced have lost all status as employees and will *not* be given lay-off status.
4. In a serious effort to bring about a settlement of the strike the Company offered a compromise proposal concerning the five discharged employees. Since the Union has rejected and ridiculed this offer as unfair, discriminatory and inadequate, the Company now withdraws this compromise proposal and takes the position that these five individuals are all permanently discharged.
5. The Company will give the Union a list of those former employees who have been replaced to date. To the extent possible we will furnish a list of those whose jobs have been discontinued.

General Counsel's Exhibit 11.

6. The Company is willing to accept the Union's offer to terminate the strike and stop picketing. Once the strike is terminated and employees are free to come to work without fear of reprisal the reason for granting returning employees additional seniority will be over. Therefore in response to the Union's request the Company agrees not to give additional seniority to those coming back after such termination. Those employees already working when the strike ends will continue to have the job security granted to them when they came to work.
7. We can not agree to a moratorium pending termination of the strike. It is essential that the Company continue to move toward full production.
8. The Company reminds the Union that the Union can end the strike at any time . . . even without a contract . . . and return to work those of its members still entitled to available jobs.

General Counsel's Exhibit 12.

General Counsel's Exhibit 12

REPLACEMENT POLICY AND PROCEDURE

May 27, 1959

Permanent replacement of former bargaining unit employees who are on strike will take place as follows:

1. Replacements will be made by Job Classification within a department commencing with the least senior employee on the job classification needed to meet production requirements in the department concerned.
2. All replacements will be hired to fill help requisitions that are filed in the Personnel Department's Employment Office.
3. All new hires will become permanent replacements.
4. All bargaining unit employees who were at work on March 31, 1959 and who present themselves for employment prior to the settlement of the strike will be reinstated in their former job classifications and departments provided the job is still available or they have not been permanently replaced.
 - (a) In the event the former job no longer exists, such employees will be assigned to other suitable and available work for which they are qualified as permanent replacements.
 - (b) In the event the employee has been permanently replaced, then they will be considered as an applicant for available work and if they are re-hired they will be assigned to suitable and

General Counsel's Exhibit 12.

available work for which they are qualified as permanent replacements.

5. All employees who were on lay-off on March 31, 1959 and who present themselves for work and are accepted, will be given any available job for which they are qualified.
6. All new hires, rehires and returned employees described in 3, 4 and 5 above will have twenty (20) years added to their regular length of service seniority date. Such special seniority consideration shall be used only in case of lay-off and recall from lay-off.
7. In all other respects such as promotions, vacations, Pension, etc., such employee's special seniority less twenty (20) years shall apply.

GORDON D. FERRELL
Director of Industrial Relations

GDF/as

nators . . . the last of these 49 meetings was still in session when Union officials called the strike. At that point, Federal and State mediators were called in to help speed the end of the strike. From April 1 to June 3, nineteen meetings were held with the able and skilled help of these experienced mediators.

On June 5th . . . after the employees, the Community and the Company had suffered nine long weeks of strike . . . Local 613 and Company negotiators reached agreement on all issues which were present at the beginning of the strike.

The "significant point is that these same terms were available to the Union long before March 31st. If their acceptance required nine weeks of debate, these discussions COULD have continued with everyone still profitably at work under a contract extension.

NOW, NEW ISSUES HAVE ARisen

Now, unfortunately, the Union's conduct of the strike has created NEW issues that did not exist on March 31 . . . issues arising out of the length of this useless strike and from the violent acts of certain Union members.

Because the total Erie Community suffers in the loss from this strike, all of you are entitled to know about these new issues. There are three of them:

1. Five Union members have been discharged for specific acts of violence against other employees.
Union negotiators insist that these employees be reinstated. The Company believes that acts of violence during a strike should be dealt with precisely as they have been at all other times . . . that the harm done to the individuals assaulted was no less painful, humiliating and intimidating than it would have been during normal, law-abiding times.
2. Employees who have chosen to come to work during the strike . . . as is their legal and moral right . . . have been assured by the Company that they would not be fined or otherwise penalized by the Union and that their jobs would not end with the settlement of the strike.

The Union now asks that the Company withdraw any measure of additional job security for replacement employees. Yet, by its own actions, the union made it necessary for the company to accept replacement workers and to assure those workers some degree of job security.

The Company's urgent need and legal right to resume full production were fully explained to all Local 613 employees in our public letter of May 3. The subject and its

That leaves, then, only the question of Union Shop to excuse further delay in the Union's settling the strike.

Can it be that leaders of Local 613 are so unsure of their services to members that they must depend upon compulsory membership to hold their power? Or do they still plan to use "Union Shop" as a club to punish those who have dared to think for themselves? In either case, these are sorry reasons to keep workers on strike while with every passing day the Erie Community and Erie Resistor strikers sustain mounting losses.

asked anyone who wanted to come to work. Why risk bad trouble for a few days' pay?

Under these circumstances the Company had no choice but to exercise its legal right to assure employees that coming to work of their own free choice WOULD mean more than a "few days' pay" . . . that the end of the strike would NOT mean the end of their jobs. The Company has given that assurance to all who have come to work under these circumstances AND IT WILL CONTINUE TO DO SO in good faith within its legal rights.

3. Out of respect for the personal rights of employees now at work, the Company can no longer make Union membership a requirement for employment in bargaining unit classifications of Erie Resistor.

Union negotiators continue to insist upon automatic Union membership as a condition for keeping a job at Erie Resistor.

Whether intentionally or otherwise, the Union has created a fear among many presently working employees that the "Union Shop" would be used as a weapon against them. Others now working feel that the Union has done a disservice to ALL employees in calling and prolonging a strike which has hurt everyone and helped no one. There is evidence, also, that Union leadership has flagrantly used the power of "Union Shop" unfairly . . . as a weapon of fear and intimidation.

The Company has a moral obligation to respect the wishes of those who do NOT choose to be Union members . . . just as it willingly respects the right of those who DO.

The Company has proposed a Maintenance of Membership arrangement which would give the Union complete freedom to work sincerely in behalf of its members, and to enroll as many more as its good performance and salesmanship could attract.

HOW MANY OF THESE THREE STRIKE-CREATED "ISSUES" CAN BE INFLUENCED BY PROLONGING THE STRIKE?

Whether the strike ends tomorrow or a month from tomorrow, only the last of these three "issues" (Union Shop vs. Maintenance of Membership) need be the subject of further discussions between Union and Management negotiators.

The Union has appealed to the National Labor Relations Board, to reinstate employees discharged for acts of violence, and to revoke the Company's assurance of job security for employees who came to work during the strike. Both the Union and the Company are now bound to accept the ultimate decisions of the federal authorities on these two points and those decisions will be just as binding and just as inclusive whether we ARE or ARE NOT working together while they are being reached.

G. Richard Fryling

President

ERIE RESISTOR CORPORATION

JUNE 14, 1959

ERIE RESISTOR CORPORATION

Erie, Pennsylvania

General Counsel's Exhibit 13.

General Counsel's Exhibit 13

REPLACEMENT POLICY & PROCEDURE

JUNE 15, 1959

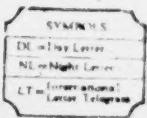
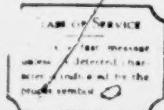
The Replacement Policy & Procedure announced May 27, 1959 is hereby amended as follows:

4 (B) Add thereto the following "All employees who have been replaced and who desire assignment to other work will fill out the attached statement of qualification."

8. Add paragraph 8 as follows:

"8." In the collective bargaining sessions, the Union has objected to the grant of 20 years seniority as provided in paragraphs 6 & 7 of our policy announced May 27, 1959. The Company has therefore offered to substitute the same seniority heretofore enjoyed by Union Officers as set forth in paragraph 18 of the collective bargaining agreement dated April 8, 1957. If the Union agrees, this type of job assurance will be substituted for the 20 year plan. If no agreement on this issue is forthcoming, the 20 year plan will be followed.

General Counsel's Exhibit 14



WESTERN UNION TELEGRAM

W. P. MARSHALL, Telegram

The following is a Western Union telegram. The date line on domestic telegrams is STANDARD TIME at point of origin. Time of origin is STANDARD TIME at point of destination.

12:00
10:11 SA
21-6-17

PB17:

R-ERA272 LONG PD=ERIE PENN 25 120PM
G RICHARD FRYLING, PRES ERIE RESISTOR CORP.
644 WEST 12 ST ERIE PENN

6-25 A
21-6-17

THIS TELEGRAM IS FORMAL NOTICE TO YOU THAT LOCAL 61-
IUE AFL CIO HAS TERMINATED THE STRIKE AS OF 530PM
WEDNESDAY JUNE 24, 1959 THIS TELEGRAM ALSO IS FORMAL
NOTICE TO YOU THAT ALL STRIKING EMPLOYEES ARE READY,
WILLING AND ABLE TO RETURN TO WORK AND DESIRE
RE-INSTATEMENT IN LINE WITH THEIR SENIORITY AS PER
THE AGREEMENT REACHED WITH YOUR REPRESENTATIVES THE
LOCAL FURTHER REQUESTS THAT TALKS BE RESUMED
IMMEDIATELY TO SETTLE THE ONE ISSUE REMAINING
UNRESOLVED.

EDWARD F. BORDONARO PRES LOCAL 61-IUE AFL CIO***

General Counsel's Exhibit 15.

General Counsel's Exhibit 15

June 25, 1959

Local 613 IUE AFL CIO

Edward F. Bordonaro, President

We welcome your notification received at 3:30 P.M. today that Local 613 IUE has decided to terminate the strike against Erie Resistor Corporation, and we accept your assurance that the strike is terminated without a contract.

We understand that the agreement referred to in your wire is simply that we will furnish you with a list of those persons who have been replaced and a list of those jobs which have been discontinued, and that we will call back to work those still eligible for jobs in an orderly fashion and as promptly as business warrants. This we agree to do.

G. Richard Fryling, President

ERIE RESISTOR CORPORATION

*General Counsel's Exhibit 21.***General Counsel's Exhibit 21**

Tuesday, May 12, 1959—7:00 A. M.

In the negotiation meeting Monday night, the Union's proposals showed that they continue to have no serious regard for the basic problems of the Company.

On job selection and seniority, the union made no new proposals that would eliminate the musical chairs type of bumping.

On freezing of seniority of quality control inspectors who are promoted out of the bargaining unit, the company will not sell these employees "down the river". The Union's offer to establish a fact finding board to determine if this question should be arbitrated, does not solve this problem of human rights.

In their counter-proposal for a wage reopening in November, Local 613 wants the right to either strike or to submit the question to arbitration. This subject is basic to the management of any business and cannot be delegated to any 3rd party who is both the judge and the jury.

Thank you for calling.

ERIE RESISTOR CORPORATION

Thursday, June 25, 1959

We are happy to report that the 85 days-old IUE Local 613 strike against Erie Resistor has ended. Edward F. Bordonaro, president of Local 613, in a telegram to Resistor president G. Richard Fryling, announced that the Local has terminated its strike against the

General Counsel's Exhibit 22.

Company, and that the employees will return to work without a contract. There is one issue remaining unsettled, that of the five discharged employees.

All employees who were at work Thursday are to report for work Friday at their regular times. Those employees who have not previously returned to work will be notified individually when to report for work, and should not return until they have been notified. Those still eligible for work will be called back as promptly as business warrants.

Thank you for calling.

General Counsel's Exhibit 22**ERIE RESISTOR CORPORATION**

Wednesday April 8, 1959

*Statement of Company's Position***Before Federal Mediator Grover Stainbrook**

1. The Company's basic objective in these negotiations has been to try to provide an operating climate that will permit us to keep and provide more jobs in Erie.
2. We have explained our business and operating problems to the Union officials.
 - (1) Fluctuations in our business cycle are beyond our control because we are a manufacturer's supplier of component parts.
 - (2) We must compete for customer orders in a highly competitive market where dollar value,

General Counsel's Exhibit 22.

quality, quantity, delivery and service are all of vital importance.

- (3) Our product diversification requires a great variety of specialized training and work experience. The constant movement and retraining of employees under such conditions is cumbersome, costly, unprofitable, non-competitive and unrealistic.
3. We must have relief from this game of "musical chairs" if we are to continue to stay in Erie and provide jobs on a profitable basis.
4. We can neither continue some of our present product lines nor add new product lines under these unrealistic conditions.
5. We have tried to arrive at a workable system which would minimize the movement of employees from job to job or chair to chair and thereby give us the stable and experienced work force we must have if we are to stay in business on a competitive and profitable basis.
6. The Company was determined to get such a change, if we could, without resorting to a strike. In an eleventh hour effort to reach an agreement the Company reluctantly offered the Union a package deal whereby the Company agreed to drop its proposals and to continue the provisions of the old contract on Sections 6, 8, 11, 12, 13, 14, 15, 16, 33, 42, 44, 45, 48, 61 and 62 providing the Union would likewise drop its remaining proposals.
7. In reply, the Union agreed to continue the provisions of the old contract on Sections 11, 12, 13, 14,

General Counsel's Exhibit 22.

- 15, 16, 42, 44, and 45. The Union then asked for further consideration on Sections 6, 8, 33, 48, 61, 62, safety glasses and a wage increase of 9¢ per hour.
8. In an all night marathon session the Company made still further concessions on Section 33, 61, and made an offer on Section 48 in an effort to reach an agreement.
9. The Union finally took a firm unyielding position on the remaining issues:
- (1) A wage increase
 - (2) Limiting of sub-contracting (Section 6)
 - (3) Freezing of seniority for Q. C. Inspectors (Section 8)
 - (4) Three weeks vacation after 10 years (Section 48)
 - (5) Company to pay any additional cost of group insurance (Sec. 62)
10. Summary:

The Company's objective is to keep jobs in Erie if at all possible but this can only be done by solving the basic problem of providing the kind of operating climate that is necessary in order for us to compete on a profitable basis.

The Union has called this strike over issues which the Company cannot accept.

The Company is willing to cooperate with the Mediator and to explore any proposals which will lead to a mutually agreeable settlement.

GORDON D. FERRELL
Director of Industrial Relations

*General Counsel's Exhibit 25.***General Counsel's Exhibit 25**
ERIE RESISTOR CORPORATION*Pioneers in the Development of
Electronics and Plastics*

644 West 12th Street, Erie, Pa.

Phone: 2-1481

May 14, 1959

TO ALL MEMBERS OF LOCAL 613 I.U.E. (A. F. L. - C. I. O.)

Many of you have told us that you would like to return to work but are afraid of the fines or excessive dues which may be levied against you by the Union.

We understand that some of you have been told by Union officials that those who return to work will be fined or have their monthly dues increased. We know also that several members now working have received a letter from Edward Bordonaro, Local 613 president, stating:

"In crossing the picket lines, the fruits of your labor will be wiped out and a fine will be levied."

THESE ARE MERE THREATS! Under the Taft-Hartley law, your only requirement is to pay the periodic dues uniformly required of **ALL** members,

In summary, these are the legal facts:

1. It is your legal right to return to work, if you want to. It is your legal right to refrain from returning to work, if you want to.
2. The Union cannot cause your discharge . . . now or later . . . because you return to work.

General Counsel's Exhibit 25.

3. You cannot be required to pay any more dues than any other member of Local 613. You cannot be required to pay a fine to keep your job. If the Union asks the Company to discharge you for not paying a fine or paying excessive dues, the Company will refuse to do so and the Union will be charged with an unfair labor practice.

Whether you decide to return to work or not is your own decision to make. Under the law neither the Company nor the Union can coerce, threaten, or otherwise pressure you into making up your mind.

Very truly yours,

ERIE RESISTOR CORPORATION

G. RICHARD FRYLING

President

General Counsel's Exhibit 26.

General Counsel's Exhibit 26
ERIE RESISTOR CORPORATION

*Pioneers in the Development of
Electronics and Plastics*

644 West 12th Street, Erie, Pa.

Phone: 2-1481

May 19, 1959

TO ALL MEMBERS OF LOCAL 613 I.U.E.:

Our negotiations with Local 613 I. U. E. seemingly have come to a standstill. Monday produced no progress whatsoever toward settlement of the strike. No future meetings between Company and Union are scheduled. At this writing there are still unresolved such items as accumulation of seniority (Section 8); wage reopeners; seniority plan (Secs. 11, 12, 13, 14, 15); discharged employees and legal actions. We are no closer today than we were sometime ago on several major issues and unfortunately, new issues arise out of changing conditions due to the continuance of the strike.

For example, your Company takes a firm stand with regard to replacement workers:

Employees who come back to work will not be discharged because they have crossed picket lines. The Union cannot later force your discharge if you cross a picket line, a fact which can be checked by getting in touch with the National Labor Relations Board in Pittsburgh, Pa. The Company will protect the job rights of employees who are now working and who are now returning to work.

General Counsel's Exhibit 26.

Meanwhile, what little job security still remains for us all at Erie Resistor in Erie is being maintained by those employees, both union and non-union, who are coming to work every day.

I hope that all of you understand fully that your Company's last proposal on seniority is one which affords you the protection you want. The Company's plan to end "musical chairs" bumping does *not* take away your seniority. Under the Company's proposal, the reduction of an employee in any existing department would result in the layoff of the least senior employee in the whole bargaining unit. . . . the same as under the old arrangement. The only difference is that the new plan limits to two or three, the dozens of job shifts that used to take place to accomplish the same end.

Whether these issues are grave enough to justify the paydays you have been missing is a decision which only you can make. Whether you return to work *now* or await the ending of this strike is, likewise, a matter which you must decide for yourself.

Sincerely yours,

G. RICHARD FRYLING
President

*General Counsel's Exhibit 27.***General Counsel's Exhibit 27**

July 17, 1959

SETTLEMENT AGREEMENT

In addition to the provisions of the Labor Agreement of July 17, 1959, it is further understood and agreed that the following shall also be effective from this date forward:

1. The Company's replacement and job assurance policy to be resolved by the NLRB and the Federal Courts and to remain in effect pending final disposition.
2. No dispute arising out of the Company's replacement and job assurance policy nor any dispute which arose prior to the signing of the Labor Agreement is to be subject to the grievance or Arbitration procedure.
3. Superseniority for Union Officers and Stewards applies only to those who are employees of the Company unless resolved otherwise per item I above.
4. Val Skiba and Edward Karpinski are to be reinstated after a thirty-day disciplinary lay-off beginning June 29th and there is to be no further discussion in the cases of Burin, Grafius and Gilson now or at any future time.
5. Employees who are not now at work and who are out of seniority order, because their jobs were eliminated during the strike, will be considered as bidders on all posted job openings

General Counsel's Exhibit 27.

until such time as they have all been returned to work. It is assumed that all such employees will be placed by August 3, 1959.

6. All jobs in frozen departments will be posted per the Labor Agreement on August 3, 1959.
7. The Company and the Union, its officers, agents and members, agree not to discriminate against any employees because of the exercising of their right to work or not work during the strike.

Signed this 17th day of July, 1959.

For the Union, Local 613, IUE, AFL-CIO

EDWARD F. BORDONARO

EDWARD L. KARPINSKI

SAMUEL FARGIORGIO

For the International Union:

WILLIAM W. COX

For the Company:

GORDON D. FERRELL

LEWIS J. SHIOLENO

G. M. SCHAU

*General Counsel's Exhibit 28.***General Counsel's Exhibit 28****ERIE RESISTOR CORPORATION****Maintenance of Membership****August 11, 1959**

The following information is being posted to clarify the Maintenance of Membership provisions of the Labor Agreement.

1. You need not be a member of the Union as a condition of employment.
2. If you are now a member of the Union and wish to remain one, you need only to continue to tender your periodic dues.
3. You may become a member of the Union at anytime during your employment by signing an application for membership, paying an initiation fee and tendering monthly dues.
4. If you are now a member of the Union and wish to resign, you must do so before August 17, 1959, otherwise, you must remain a member in good standing for the duration of the Labor Agreement to March 31, 1960.
5. Those wishing to resign during this escape period must notify the Union and the Company in writing. This may be done by simply completing a notice of resignation card which may be obtained from your Foreman or Operation Manager. To complete the card (see attached sample) fill in the date, your signature and clock number, then mail the top half of the card to Local 613 IUE, AFL-CIO and give the

General Counsel's Exhibit 28.

lower half of the card to your immediate Supervisor who will forward it to the Payroll Department.

GORDON D. FERRELL

Director of Industrial Relations

GDF/as Approved For Posting
Personnel Department
Erie Resistor Corporation

Date.....

International Union of Electrical, Radio
and Machine Workers, AFL-CIO, Local 613
531 French Street
Erie, Pennsylvania

I hereby tender my resignation from membership in the International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 613 and hereby revoke my existing check-off authorization, both to become effective immediately.

Signature.....Clock No.....

Date.....

Paymaster,
Erie Resistor Corporation:

I hereby tender my resignation from membership in the International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 613 and hereby revoke my existing check-off authorization, both to become effective immediately.

Signature.....Clock No.....

*General Counsel's Exhibit 34.***General Counsel's Exhibit 34****INTERNATIONAL UNION OF ELECTRICAL,
RADIO & MACHINE WORKERS, AFL-CIO**

Affiliated With the American Federation of Labor and
Congress of Industrial Organizations

Local 613

[SEAL]

Phone 2-6093

531 French

Erie, Penna.

May 6, 1959

Dear Sister:

You have been approached because we have been informed that you are a scab.

We would like to impress upon you the penalties involved as prescribed in our Local's Constitution and Bylaws which states:

ARTICLE 22, Section 9: Members may be fined, suspended or expelled for any of the following acts herein-after provided: (1) Working for or in an establishment which is on strike; and (2) Working as a strike breaker or violating the adopted standards as to wages, hours, or working conditions.

Section 10: Any member who refuses to perform the duties requested of him during a strike conducted by the Local Union by the appropriate authority may be fined, suspended or expelled from the Union. Any member who after strike action has been voted in accordance with the provisions, by majority action of this Constitution attempt to disrupt or demoralize members of the Union may be fined, suspended or expelled from Local 613.

General Counsel's Exhibit 35.

In crossing the picket line, the fruits of your labor can be wiped out and a fine will be levied, the amount of which is set by the Executive Board of Local 613, IUE-AFL-CIO.

Fraternally yours,

LOCAL 613, IUE-AFL-CIO

EDWARD F. BORDONARO

Edward F. Bordonaro

President

iue afl cio

General Counsel's Exhibit 35

May 28, 1959

RECALL TO WORK AFTER STRIKE

The Company shall recall employees in such number and at such times as it deems practical and economical to supplement its production and maintenance work force scheduled or working on the date of the execution of this contract.

All employees working at the time of the execution of this agreement shall be deemed to have their regular length of service seniority plus twenty (20) years.

This seniority consideration shall be used only in case of lay-off and recall from lay-off.

The Seniority Sections of the contract shall apply to all other bargaining unit employees with the exception as stated above.

General Counsel's Exhibit 41.

General Counsel's Exhibit 41

Bes. No. R-182

July 1959

CHRONIC

LABOR SURPLUS

AREAS

experience and outlook

An Analysis of Recent Labor Market Developments and Employment Outlook in Chronically-Depressed Areas and Other Areas with Relatively Heavy Unemployment.

U. S. DEPARTMENT OF LABOR

JAMES P. MITCHELL, Secretary

BUREAU OF EMPLOYMENT SECURITY

Robert C. Goodwin, Director

Washington 25, D. C.

Office of Program Review and Analysis

Louis Levine, Assistant Director,

Bureau of Employment Security

This study was prepared by Harold Kuptzin, Chief, Branch of Labor Market Studies of the Division of Labor Market and Manpower Studies, Gladys F. Miller, Chief under the general direction of Lazar M. Paves, Deputy Assistant Director for Manpower Studies and Research Development. Charts and layout were prepared by Evelyn Eckert, Bureau Illustrator.

* * * * *

*General Counsel's Exhibit 41.****Labor Market Situation in the Erie, Pennsylvania Area******Area Description and Economic Characteristics:***

The Erie labor market area includes all of Erie County located in northwestern Pennsylvania on the south shore of Lake Erie. The area's 1950 population was 219,400. The city of Erie, the area's principal population center, had 130,800 inhabitants in 1950. No other community in the area had more than 10,000 residents at that time.

Erie is basically a hard goods manufacturing center, with the bulk of its factory production concentrated in metal working industries. Manufacturing employment totaled 34,200 in March 1959, representing nearly one-half (47.2 percent) of the area's 72,500 nonfarm wage and salary workers. Over three-fourths of the local factory workers were employed in durable goods industries—principally in machinery and transportation equipment (13,100 workers in March 1959), primary metals (4,300) and fabricated metal products (4,100). Employment in the machinery-transportation equipment group is down sharply (42 percent) since May 1950, when this industry provided jobs for 22,500 area workers. Locally significant non-manufacturing industries in Erie include trade (13,500 workers in March 1959), service (8,300) and government (6,900).

Nature of Unemployment Problem: Unemployment in the Erie labor market area has been at relatively high levels for most of the period since the end of the Korean conflict. Employment in this area reached an all-time high of 86,300 in May 1953, but dropped back very sharply (by about 10,000) in the following two years because

General Counsel's Exhibit 41.

of sizeable cutbacks in refrigerators, freezers, and air conditioners, accompanying a changeover in the type of production at one of the area's leading industrial plants, and the transfer of refrigerator production and related activities to an out-of-area location. Local employment conditions improved to some extent in late 1956 and early 1957, and the area was placed in a moderate labor surplus classification between July 1956 and July 1957. Unemployment in the area began to rise again in late 1957, and averaged about double the national rate during 1958. In March 1959, some 15,300 local workers, representing 15.4 percent of the area's labor force, were unemployed —a jobless ratio close to two and one-half times the country-wide average of 6.4 percent. Skilled and semi-skilled workers, most with previous industrial experience, made up about 40 percent of the area's jobless rolls.

Recent Labor Market Developments: Employment declines in the Erie area during the recent business recession were considerably sharper than in the Nation as a whole. Local nonfarm employment totals in March 1958 were 9.4 percent below the March 1957 level—approximately two and one-half times the national average decrease of 3.7 percent for the same period. Area cutbacks were concentrated primarily in durable goods industries, particularly in machinery and transportation equipment (locomotives) and in primary and fabricated metals. Area employment totals continued to decline during the year ending March 1959, despite a slight pickup in the closing months of the period. As a result, March 1959 nonfarm employment in Erie was 2,100 (-2.8 percent) lower than a year earlier and 9,800

General Counsel's Exhibit 41.

(-11.9 percent) below that of March 1957. Overall job losses since May 1950 totaled 7,600 workers, or 9.5 percent. During this period, job totals in the Nation as a whole have increased by 16.0 percent.

Erie, Pennsylvania

Unemployment in the Erie area decreased slightly—to 12.4 percent of the labor force—between Mid-March and mid-May 1959. Improvements were centered primarily in seasonal nonmanufacturing activities, although a number of factory industries also posted gains. Local employers have scheduled a further moderate pickup between May and September, with both factory and nonmanufacturing industries participating in the rise. Even if these increases materialize, however, area unemployment totals are expected to remain considerably above the national average. There are no known expansion plans beyond September which may significantly affect the area's long-term outlook.

General Counsel's Exhibit 41.

ERIE, PENNSYLVANIA AREA
SELECTED EMPLOYMENT AND UNEMPLOYMENT DATA
May 1950—March 1959

Item	March 1959	March 1958	March 1957 (1)	May 1950 (2)	Month and Year		Percent Changes
					5/50- 3/59	3/58- 3/59	
Employment:							
Nonagricultural							
Wage and Salary	72,500	74,600	82,300	80,100	-9.5	-9.4	-2.8 -11.9
Manufacturing	34,200	35,800	42,900	44,800	-23.7	-16.6	-4.5 -20.3
Machinery & Transp. Equip.	13,100	14,400	19,300	22,500	-41.8	-25.4	-9.0 -32.1
Unemployment:							
Number of Workers	15,300	12,200	6,100	3,400	+350.0	+100.0	+25.4 +150.8
Percent of Labor Force	15.4	12.4	6.2	3.6

(1) Employment data adjusted to new SIC codes and March 1958 benchmarks.

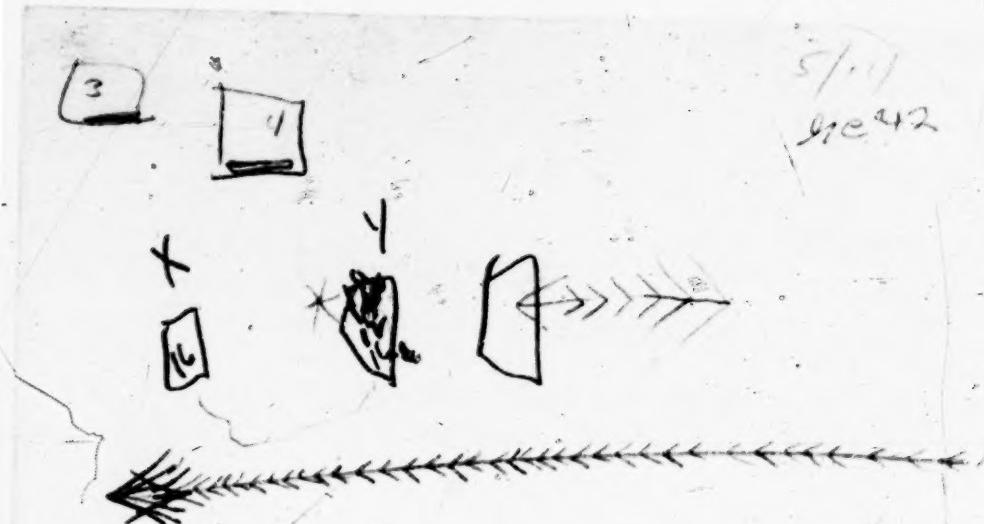
(2) Employment data adjusted to new SIC codes.

Source: Pennsylvania Bureau of Employment Security (Unadjusted Data)

(Note: March 1959 data are preliminary.)

U. S. DEPARTMENT OF LABOR
 Bureau of Employment Security

General Counsel's Exhibit 42



3 files + 2nd layer discharge
 4 documents = beginning resistance
 4 negotiations, type I had machine
 4 S/S - no change
 (and company admits that it can't demand)

NATIONAL LABOR RELATIONS BOARD

~~6 CA 1790~~
~~6 RE~~ OFFICIAL COPY NO. 43

Disposition	<input checked="" type="checkbox"/> Identified <input checked="" type="checkbox"/> Received <input type="checkbox"/> Rejected
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The matter of Eric Resister
 5/24/60 REC'D. MES
 in Page 60

	Original	Print
Proceedings in the United States Court of Appeals for the Third Circuit		
Petition for review of an order of the National Labor Relations Board in case No. 13,695	590	1
Petition for review and setting aside an order of the National Labor Relations Board in case No. 13,700	590	1
Motion for leave to intervene, in case No. 13,700	592	3
Motion to consolidate cases	596	5
Order granting motion for leave to intervene and to consolidate cases, etc	602	10
Answer to petition for review in case No. 13695	605	11
Answer to petition for review and cross-petition for enforcement in case No. 13,700	606	12
Opinion, Smith, J	608	13
Judgment	610	14
Clerk's certificates (omitted in printing)	620	22
Order allowing certiorari	621	23
	623	24

590 In United States Court of Appeals for the Third Circuit

No. 13695

INTERNATIONAL UNION OF ELECTRICAL, RÁDIO AND MACHINE
WORKERS, LOCAL 613, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*Petition for review of an order of the National Labor
Relations Board*

Filed August 1, 1961

To the honorable, the JUDGES OF THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT:

International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO, pursuant to the National Labor Relations Act, as amended, (61 stat. 136, 29 USC, Section 141 *et seq.*) hereinafter called the Act, respectfully petitions this Court for the review of an order of the Respondent, National Labor Relations Board, hereinafter referred to as the Board, directing Erie Resistor Corporation, Erie, Pennsylvania, hereinafter referred to as the Company, to cease and desist from certain conduct and to take other affirmative action, but failing to order the Company to take certain other actions and to cease and desist from certain other conduct contended by Petitioner to violate the National Labor Relations Act, as amended. The proceedings resulting in said order are known upon the records of the Board as "Erie Resistor Corporation and International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO," Case No. 6-CA-1790.

1. Upon due proceedings had before the Board in said
591 matter on October 18, 1960, a Trial Examiner of the
Board issued his intermediate report, in which he made findings of fact and conclusions of law and recommended that the Complaint issued against the Company be dismissed in its

entirety. Thereafter, upon exceptions filed by Petitioner and the General Counsel of the Board, the Board issued its decision and order on July 31, 1961, in which it reversed the recommendations of the Trial Examiner and issued its above described order. The decision and order of the Board are reported at 132 NLRB No. 51.

2. This Court has jurisdiction of this petition, which is brought by a party aggrieved by the final order of the Board, by virtue of Section 10(f) of the Act, as amended.

3. The findings and order of the National Labor Relations Board, to the extent that they failed to find additional violations of the Act, as amended, and to order the Company to cease and desist therefrom and to take additional affirmative action, are not supported by substantial evidence on the record before it or by applicable law.

WHEREFORE, the Petitioner prays that the Court take jurisdiction of the proceedings and of the questions determined therein, review the final order of the Board, and make and enter upon the pleadings, testimony, evidence and proceedings set forth in the transcript, a decree modifying the order of the Board and ordering the Company to cease and desist from additional conduct and take additional affirmative action, and requiring the Company, its officers, representatives, agents, successors, and assigns to comply therewith.

BENJAMIN C. SIGAL,
Philip Murray Building,
1126 16th Street, N.W.,
Washington 6, D.C.

(S) M. H. GOLDSTEIN,
22nd Fl., Market St. Nat'l Bank Bldg.,
Philadelphia 7, Pennsylvania.
Attorneys for Petitioner.

[File endorsement omitted.]

592 In United States Court of Appeals for the Third Circuit
No. 288

No. 13700

ERIE RESISTOR CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for review and setting aside an order of the National Labor Relations Board

Filed August 3, 1961

(In the matter of Erie Resistor Corporation and International Union of Electrical, Radio and Machine Workers, Local Union No. 613, AFL-CIO—Case No. 6-CA-1790)

To the honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

Your petitioner, ERIE RESISTOR CORPORATION, respectfully represents as follows:

1. Petitioner is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and maintaining its principal office in Erie, Pennsylvania, where it also operates a manufacturing plant.
2. On July 31, 1961 the National Labor Relations Board, under the caption of Erie Resistor Corporation and International Union of Electrical, Radio and Machine Workers, 593, Local 613, AFL-CIO, 132 NLRB No. 51, Case No. 6-CA-1790, held that petitioner had violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act, as amended, and ordered petitioner to cease and desist from certain practices, to offer employment to and make whole certain employees or former employees, and post a notice set forth as an appendix to the Board's order. Petitioner seeks to have this decision and order reviewed and set aside.
3. This Court has jurisdiction under Section 10(f) of the National Labor Relations Act, as amended, the events alleged to be unfair labor practices having occurred in or near Erie, Pennsylvania, within the Third Judicial Circuit.

4. Petitioner intends to rely upon the following points:

(a) The decision and order of the Board is not supported by substantial evidence upon the record considered as a whole;

(b) The decision and order of the Board will not effectuate the purposes of the Act;

(c) The Board's decision and order is not based upon any findings of fact adverse to petitioner, but is based entirely upon the proposition that any grant of additional seniority to employees replacing economic strikers, called "superseniority" by the Board, is *per se* unlawful, regardless of the circumstances or manner in which the grant is made, regardless of the lawful, economic and nondiscriminatory purpose of making such a grant, and regardless of the complete absence of any anti-union background or evidence of any other alleged unfair labor practice. The question presented by the decision and order is the legal question of validity of this *per se* theory, which petitioner alleges is erroneous and contrary to the law;

(d) As found by the Trial Examiner, and as disclosed upon the record considered as a whole, petitioner's sole purpose in adopting the so-called superseniority policy was economic, lawful and nondiscriminatory, and petitioner in every respect bargained in good faith and observed the provisions of the law. Under the law petitioner was guilty of no unfair labor practice;

(e) The Board erred in failing to adopt the findings and conclusions of the Trial Examiner in their entirety;

(f) The order of the Board is in any event unduly broad upon the basis of the record considered as a whole, and will not effectuate the purposes of the Act;

(g) Both the Trial Examiner and the Board erred in excluding evidence of violence and misconduct on the picket lines;

(h) The Board erred in concluding that there was an unconditional application for reinstatement on June 25, 1959.

WHEREFORE, petitioner prays that the said Decision and Order of the National Labor Relations Board be vacated and set aside, that the National Labor Relations Board be directed to dismiss its complaint against petitioner, and that the petitioner have such other and further relief as may be just and proper.

Respectfully submitted.

(S) JOHN G. WAYMAN,

(S) REED SMITH SHAW & McCCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania.

Counsel for Erie Resistor Corporation,

Petitioner.

Of Counsel:

IRVING OLDS MURPHY,
Gifford, Graham, MacDonald & Illig,
615 Masonic Building,
Erie, Pennsylvania.

Dated: August 1, 1961.

[File endorsement omitted.]

596 In United States Court of Appeals
for the Third Circuit

No. 13700

ERIE RESISTOR CORPORATION, PETITIONER

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Motion for leave to intervene

Filed August 10, 1961

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter called the Union, the charging party in the proceedings before the National Labor Relations Board, hereinafter referred to as the Board, which resulted in the Order now being challenged in this Court on petition for review filed by the Erie Resistor Corporation, hereinafter referred to as the Company respectfully moves this Court for leave to

intervene in accordance with Rule 18(6).¹ The grounds for this motion are as follows:

1. The proceedings before the Board began with a charge filed by the Union with the Regional Director for the Sixth Region of the National Labor Relations Board at Pittsburgh, Pennsylvania, alleging, in substance, that the Company violated § 8(a) (4), (3) and (5) of the National Labor Relations Act (U.S.C. Title 29, §-158(a) (1), (3) and (5)). After investigation of the Union's charge, the General Counsel issued a complaint, and a hearing in this matter was conducted by a Trial Examiner of the Board, who issued an Intermediate Report and Recommended Order dismissing the complaint in its entirety.

597 2. Subsequently, the Board issued the Decision and Order now challenged in this Court, in which the Board rejected some of the recommendations of the Trial Examiner and gave certain relief to the charging party by ordering the Company to cease and desist from certain conduct and to take other affirmative action, and approved other recommendations of the Trial Examiner denying some of the relief requested by the Union.

3. The Union, as the charging party, was, under § 102.8 of the Rules and Regulations of the Board (National Labor Relations Board Rules and Regulations, Series 7), a party to the proceeding.² It conducted itself at all times as such a party, and was so treated by the Company, the General Counsel for the Board, and by the Board itself. The record reflects that, as a party, the Union was served with a copy of the complaint issued by the Board, and with a copy of the Company's answer; it appeared at the hearing and exercised extensively its right to examine and cross-examine witnesses and to call witnesses.

¹ Rules of the United States Court of Appeals for the Third Circuit.

² "SEC. 102.8 Party. The term 'party' as used herein shall mean the regional director in whose region the proceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a) (1) or 8(a) (2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only." [Emphasis supplied.]

Following the hearing before the Trial Examiner, the Union was served by the Board with a copy of the Board's Order transferring the case to the Labor Board, was served by the Company and by the General Counsel with copies of briefs submitted to the Trial Examiner, and, in turn, filed its brief with the Trial Examiner. Similarly, before the National Labor Relations Board, the Union filed exceptions to the Intermediate Report of the Trial Examiner, accompanied by an extensive brief, and was in turn served by the General Counsel with copies of his exceptions and brief, and by the Company with a copy of its brief in support of the Intermediate Report.

598 4. The Trial Examiner's Intermediate Report recognizes the Union's status as a party to the proceedings, as does the decision of the National Labor Relations Board. The first paragraph of the Trial Examiner's report reads,

All parties were present and represented by counsel and were afforded opportunity to adduce evidence, to examine and cross-examine witnesses, to present oral argument and to file briefs. On July 25, all counsel filed briefs which I have fully considered.

The Board's decision likewise treats the Union as a party. It notes that the Union had filed exceptions to the Intermediate Report and formally granted the motion of the Union that the Board grant oral argument. The Union, the Company and the General Counsel were allotted equal amounts of time to present oral argument. Thus, throughout the proceedings, the Union has been not only a nominal party to the proceedings, but an active and participating party therein.

5. The Board's Order, *inter alia*, prohibits the Company from discriminating against striking employees and discouraging membership in, and refusing to bargain collectively with the Petitioner. It directs the Company to bargain collectively, to make whole and restore seniority to the strikers, and to take other affirmative action which the Board found would effectuate the policies of the Act.

6. The Board failed however, to order the Company to take certain other actions and to cease and desist from certain other conduct contended by the Union to have constituted violations of the National Labor Relations Act, and the complaint in these respects was dismissed. To obtain review of this aspect

of the Board's Order, the Union filed a petition for review of that Order in this Court at No. 13695.

7. Should the Company obtain from this Court the decree its petition seeks, viz., a decree setting aside the Order of the Board and dismissing the complaint, it would mean that the Union would be deprived of the relief granted it by the 599 Board Order without an opportunity to be heard by this Court on those issues unless this motion for leave to intervene is granted.

8. The Union recognizes that there is a conflict among the Circuit Courts of Appeal as to whether or not a charging party in a case in which the Board has sustained the allegations of the complaint, should be permitted to intervene in a judicial proceeding involving the review or enforcement of such order. We respectfully submit that the denial or intervention in such cases is inconsistent with the general scheme of § 10(f) of the Act (U.S.C. Title 29, § 160(f)) which grants judicial review, as a matter of right to "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought".

9. Under this subsection, a person who files a charge is a "person aggrieved" if the Board's final order dismisses all or part of the allegations contained in the Board's complaint.⁴ Thus, the charging party, if unsuccessful before the Board, may petition a Court of Appeals for review, notwithstanding the view that the statute is designed to provide a public remedy and not merely to vindicate private rights. Where a charging party has been successful before the Board and the Board's order is being attacked on a petition for review, such party is certainly a potentially "aggrieved" person. If not permitted to intervene, such party would be in a worse position with respect to the opportunity to have judicial review than if he had been unsuccessful before the Board. Should the Court deny the charging party the right to intervene and then refuse to enforce the order of the Board, the charging party would be an "aggrieved" person, who contrary to the intention of § 10(f) of the Act [U.S.C. 29 § 160(f)], would havè

⁴ *Albrecht v. N.L.R.B.*, 181 F. 2d 652 (CA 7); *Marine Engineers Beneficial Assn. v. N.L.R.B.*, 202 F. 2d 546 (CA 3); *Korach v. N.L.R.B.*, 229 F. 2d 138 (CA 7).

been denied any opportunity for judicial review. Moreover, only a *party*, as distinguished from an *amicus curiae*, may petition for certiorari. Thus, recognition of the right of the charging party to intervene is essential if the statutory purpose of affording judicial review to persons aggrieved is to be fulfilled,

since the Board might decide not to apply to the Supreme Court for review of an unfavorable Circuit Court Decision.⁴ To deny the charging party an opportunity to participate in the judicial proceedings in the Circuit Court would, in such circumstance, substantially prejudice him as an "aggrieved person."

10. For the foregoing reasons, we respectfully urge the Court to grant the Union's motion for intervention. Moreover, a denial of the motion would be inconsistent with the clear legislative intent of the National Labor Relations Act, as amended, to afford "aggrieved persons", including charging parties, the right to petition for judicial review in the Circuit Courts and the Supreme Court.

Respectfully submitted,

(S) BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
*Attorneys for International Union
of Electrical, Radio and Machine
Workers, AFL-CIO.*

AUGUST 9, 1961.

[File endorsement omitted.]

601 CERTIFICATE OF SERVICE (omitted in printing)

10

NLRB VS. ERIE RESISTOR CORP. ET AL.

602

In United States Court of Appeals
for the Third Circuit

No. 13700

ERIE RESISTOR CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
and

No. 13695

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE
WORKERS, LOCAL 613, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Motion to consolidate cases

Filed August 16, 1961

To the honorable, the CHIEF JUDGE AND THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

ERIE RESISTOR CORPORATION, the respondent in Case No. 6-CA-1790 before the National Labor Relations Board, and petitioner in Case No. 13700 respectfully moves that Case No. 13700 and Case No. 13695 be consolidated for purposes of preparation of the record, briefing and argument upon the following grounds:

1. Both No. 13700 and No. 13695 are appeals from the same order of the National Labor Relations Board in Case No. 6-CA-1790, 132 NLRB No. 51. In No. 13700 Erie Resistor Corporation filed a petition to review and set aside the order of the Board at approximately the same time that the International Union of Electrical Workers filed a petition to review the same order in No. 13695.

2. The parties in interest are the same in both appeals, they being the Board, the respondent, and the charging party in the case before the Board. There is a single record, transcript of testimony, intermediate report and factual situation in both appeals. The legal questions are closely related in both appeals.

3. Consolidation of these appeals will conserve the time of the Court, avoid unnecessary duplication of printed records

and factual recitals and arguments, and bring the related legal questions before the Court in a single argument in which all interested parties can participate.

Respectfully submitted.

(S) JOHN G. WAYMAN,

(S) REED SMITH SHAW & McCAY,

747 Union Trust Building,
Pittsburgh, Pennsylvania.

Counsel for Erie Resistor Corporation,

Petitioner in Case No. 13,700.

Of Counsel:

Irving Olds Murphy,

Gifford, Graham, MacDonald & Illig,

615 Masonic Building,

Erie, Pennsylvania.

Dated: August 14, 1961.

[File endorsement omitted.]

605 In United States Court of Appeals for the
Third Circuit

No. 13695

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE
WORKERS, LOCAL 613, AFL-CIO, PETITIONERS

v/s.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13700

ERIE RESISTOR CORPORATION, PETITIONER

v/s.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Present: McLAUGHLIN, KALODNER and FORMAN, Circuit Judges
*Order granting motion for leave to intervene and to consolidate
cases, etc.*

August 30, 1961

Upon consideration of the motions by petitioners in the
above entitled cases,

It is ORDERED that the motion by International Union of Electrical, Radio and Machine Workers, AFL-CIO, petitioners in No. 13695, to intervene in No. 13700 be and it hereby is granted;

It is Further ORDERED that the motion by Erie Resistor Corporation, petitioner in No. 13700, to consolidate the petitions for review in the above entitled cases for briefing and argument be and it hereby is granted;

It is FURTHER ORDERED that each petitioner may file briefs in the consolidated cases, that the respondent may file a consolidated brief in answer to the briefs of petitioners and that all parties stipulate to file a joint appendix in accordance with Rule 24(6) of this Court.

By the Court.

KALODNER,
Circuit Judge.

Dated: August 30, 1961.

[File endorsement omitted.]

606 In the United States Court of Appeals
 for the Third Circuit

No. 13695

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE
WORKERS, LOCAL 613, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Answer to petition for review

Filed September 9, 1961

The National Labor Relations Board files this answer to the petition to review and modify the Board's order, issued against the Erie Resistor Corporation on July 31, 1961, and amended on August 7, 1961:

1. The Board admits the allegations of paragraphs 1 and 2 of the petition to review.
2. The Board denies the allegations of error set forth in paragraph 3 of the petition to review.
3. Pursuant to Section 10(f) of the Act, the Board is filing herewith a certified record of all documents, transcripts of testi-

mony, exhibits, rejected exhibits, and other material comprising the record before the Board in Case No. 6-CA-1790, upon which the Board's Decision and Order is based.

607 WHEREFORE, the Board prays that this Court cause notice of the filing of this answer to be served upon petitioner, and that the Court enter a decree denying the petition to review.

(S) MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D.C., this 7th day of September, 1961.

[File endorsement omitted.]

608 In United States Court of Appeals for the
Third Circuit

No. 13700

ERIE RESISTOR CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Answer to petition for review and cross-petition for enforcement

Filed September 9, 1961

The National Labor Relations Board files this Answer to the petition to review and set aside the Board's order, issued against petitioner on July 31, 1961, and amended on August 7, 1961:

1. The Board admits the allegations of paragraphs 1 and 3 of the petition to review.
2. With respect to paragraph 2 of the petition, the Board prays reference to the certified record, filed herewith, for a full recital of the facts and procedure in this case.
3. The Board denies the allegations of error set forth in paragraph 4. of the petition, subparagraphs (a) thru (h).
4. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper under the Act, and, pursuant to Section 10(e) of the Act, re-

spectfully requests this Court to enforce the order issued against petitioner in the proceedings designated on the records of the Board as Case No. 6-CA-1790.

609 5. Pursuant to Section 10 (e) and (f) of the Act, the Board is filing herewith a certified record of all documents, transcripts of testimony, exhibits, rejected exhibits, and other material comprising the record before the Board in Case No. 6-CA-1790, upon which the order is based.

WHEREFORE, the Board prays that this Court cause notice of the filing of this answer and request for enforcement to be served upon petitioner, and that this Court enter a decree denying the petition to review and enforcing the Board's order in full.

(S) MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D.C. this 7th day of September, 1961.
[File endorsement omitted.]

610 In United States Court of Appeals for the
Third Circuit

No. 13695

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE
WORKERS, LOCAL 613, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13700

ERIE RESISTOR CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On petitions for review and cross-petition to enforce an order of
the National Labor Relations Board

Argued January 26, 1962

Before KALODNER, STALEY and SMITH, Circuit Judges

Opinion of the Court

Filed May 15, 1962

611 By SMITH, *Circuit Judge*.

This case is before the Court upon petitions for review filed by the Erie Resistor Corp. (the Company), and Local 613, I.U.E., AFL-CIO (the Union), and a cross-petition filed by the National Labor Relations Board (the Board) for the enforcement of its final order. These petitions were filed under Sections 10 (f) and (e) of the Labor Management Relations Act, 1947, 29 U.S.C.A. 160 (f) and (e). The essential facts are not in dispute and the jurisdiction of this Court is conceded.

Facts

The Company maintained a manufacturing plant at Erie, Pennsylvania, where it was engaged in the manufacture and sale of electronic components, electro-mechanical assemblies, and custom molded plastics. The production and maintenance workers of the Company were, and had been since 1951, represented by the Union. There had been in force and effect successive collective bargaining agreements, the last of which was terminated on March 31, 1959.

Approximately two months prior to the termination of the then existing agreement, the Union notified the Company of its desire to enter into negotiations in anticipation of a new contract. The negotiators for the respective parties met from time to time thereafter but were unable to reach full agreement. When the existing agreement terminated on March 31, 1959, a strike was called. It is here admitted that at its inception the strike was economic. When the strike was called there were 478 production and maintenance workers actively employed and 450 on layoff status; of those on layoff status, approximately 400 had no reasonable expectation of being recalled. All of the workers actively employed joined the strike.

The Company attempted to maintain production operations during the month of April by using clerical employees and other personnel outside the bargaining unit. Production declined to a level between 15% and 30% of normal, and several customers cancelled their orders with the Company. On May 3, 1959, each of the strikers was notified by letter that the Company intended "to obtain replacements"; they were further notified that they would hold their positions only until replaced. The hiring of replacements commenced on May 11, and continued thereafter until June 24, 1959. The replacements included new employees, employees

on layoff status, and returning strikers. When the applicants were accepted they were told that they would not be laid off or discharged by reason of the settlement of the strike.

When the negotiators met on May 11, 1959, the representatives of the Union were informed that replacements were being assured that they would not be discharged upon settlement of the strike. The Company, prompted by a desire to implement its assurances, proposed that the existing seniority system be so modified as to accord the replacements some form of preferential seniority. The Company offered to consider any plan acceptable to the Union, but the offer was rejected. The subject was discussed at five sessions held between May 11th and May 28th. The representatives of the Union remained adamant in their refusal to consider it on the ground that a preferential seniority system would be discriminatory and illegal.

On May 27, 1959, the Company formulated a preferential seniority plan under which twenty years were added to the regular length of service of all production and maintenance workers who accepted employment during the strike. The plan was limited in its application to future layoffs and recalls from lay-off. The Union was informed of the plan on the following day and publicized it in radio and television broadcasts on May 30th and 31st. The strikers were informed by letter addressed to each of them by the Company on June 10th; copies of the plan were posted on the Company bulletin boards on June 15th.

Notwithstanding the formulation of a preferential seniority policy, the Company expressed a willingness to consider any alternative plan proposed by the Union.

The strike ended on June 25, 1959, after the Union withdrew the picket line and offered to submit the seniority issue to the Board. Thereafter the strikers who had not been replaced were recalled by the Company in the order of seniority. By July 5th, 358 production and maintenance workers had returned to work; this number increased to 442 by September 20th. Thereafter, between September of 1959 and May of 1960, 202 employees were laid off for economic reasons; many of these were recalled strikers whose seniority was insufficient only because of the operation of the preferential seniority plan.

Decision and Order of the Board

The Trial Examiner concluded that under the applicable decisions a preferential seniority policy cannot be held illegal in

by a desire "to encourage or discourage membership in a labor organization."

The Supreme Court has consistently held that the discriminatory conduct of an employer is not unlawful in the absence of an illegal motive. *Teamsters Local v. Labor Board*, 365 U.S. 667 (1961); *Radio Officers v. Labor Board*, 347 U.S. 17 (1954); *Labor Board v. MacKay Co.*, 304 U.S. 333 (1938); *Labor Board v. Jones & Laughlin*, 301 U.S. 1 (1937). The Court has adhered to the view that motivation is a relevant factor and the test of the employer's conduct. *Ibid.*

The case of *Teamsters Local v. Labor Board*, *supra*, is pertinent. The matter came before the Board on a complaint which charged that an exclusive hiring agreement between an employer and a union violated Sections 8(a) (3) and (1). The agreement was held illegal on the ground that it inherently and unlawfully encouraged union membership.² The decision of the Board was sustained by the Court of Appeals.³ The decision of the Court of Appeals was reversed by the Supreme Court. While the ultimate decision of the latter Court appears to rest on other grounds, the majority opinion reiterates that "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." *Teamsters Local v. Labor Board*, *supra* at page 675.

The relevance of motive as a determinative factor is discussed at length in the concurring opinion of Mr. Justice Harlan, with whom Mr. Justice Stewart concurred, 365 U.S. 667, 677-685. It is therein stated, at page 679:

What in my view is wrong with the Board's position in these cases is that A MERE SHOWING OF FORESEEABLE ENCOURAGEMENT OF UNION STATUS IS NOT A SUFFICIENT BASIS FOR A FINDING OF VIOLATION of the statute. It has long been recognized that an employer can make reasonable business decisions, UNMOTIVATED BY AN INTENT TO DISCOURAGE UNION MEMBERSHIP OR PROTECTED CONCERTED ACTIVITIES, although the foreseeable effect of these decisions may be to discourage what the act protects. [Emphasis by this Court.]

² *Los Angeles-Seattle Motor Express, Incorporated, et al.*, 121 NLRB 1629 (1958); see also *Mountain Pacific Chapter, etc.*, 119 NLRB 583 (1957).

³ *Local 357, International Brotherhood, etc. v. NLRB*, 275 F. 2d 646 (D.C. Cir. 1960).

Mr. Justice Harlan went on to say, at page 680: "In general, this Court has assumed that a finding of a violation of § 8(a) (3) or § 8(b)(2) requires an affirmative showing of a MOTIVATION of encouraging or discouraging union status or activity."

616 We are of the opinion that *Radio Officers v. Labor Board*, supra, lends support to our point of view.⁴ We refer particularly to *NLRB v. Gaynor News Co.*, 347 U.S. 17, 34. Therein the employer and the union were parties to an agreement under which the union was recognized as the exclusive bargaining agent for both union and non-union employees. Pursuant to the terms of a supplementary agreement, retroactive wage increases were granted to union employees but denied non-union employees; gratuitous vacation benefits were granted and denied on the same basis.

The matter came before the Board⁵ on a complaint which charged the employer and the union with a violation of Sections 8(a) (3) and (1). The only answer offered by the employer was that the retroactive wage payments and gratuitous benefits had been paid under the compulsion of a legally binding contract. The Board concluded, as did the Trial Examiner, that the contract afforded no defense to the charge. We agree with this conclusion. The Board held that the disparate treatment of the employees on the basis of union membership foreseeably encouraged union membership and was therefore a violation of the pertinent sections under which the employer and the union were charged.

The view of the Board was sustained by the Supreme Court, which held that the evidentiary facts, absent proof of a valid business reason, were sufficient to support an inference that the disparate treatment of the employees was intended to encourage union membership. The Court said, at page 46: "No more striking example of discrimination so foreseeably causing employee response as to obviate the need for any other proof of intent is apparent than the payment of different wages to union employees doing a job than to non-union employees doing the same job."

⁴ Three cases were consolidated for hearing and disposition.

⁵ *Gaynor News Co., Inc., et al.*, 93 NLRB 299 (1951).

617 The Court held, at page 47, "that in the circumstances of this case, the union being exclusive bargaining agent for both member and nonmember employees, the employer could not, without violating § 8(a)(3), discriminate in wages solely on the basis of such membership even though it had executed a contract with the union prescribing such action. Statements throughout the legislative history of the National Labor Relations Act emphasize that exclusive bargaining agents are powerless 'to make agreements more favorable to the majority than to the minority.' Such discriminatory contracts are illegal and provide no defense to an action under § 8(a)(3)."

The Supreme Court held: "that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3),"⁶ but it did not disregard motivation as a relevant factor. The Court said:

The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8(a)(3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, in which we upheld the constitutionality of § 8(3), we said with respect to limitations placed upon employers' right to discharge by that section that "the [employer's] true purpose is the subject of investigation with full opportunity to show the facts." ID., at 46. In another case the same day we found the employer's "real motive" to be decisive and stated that "the act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees." *Radio Officers v. Labor Board*, *supra*, at page 43.

⁶We recognize, as did the Supreme Court in the cited case and in other cases, the right of the Board to draw an inference of unlawful motive in the absence of evidentiary facts to support an inference to the contrary.

618 It was established by *Labor Board v. MacKay*, supra, that an employer, TO PROTECT AND CONTINUE HIS BUSINESS, may replace strikers during the strike and assure the replacements that their employment will not be terminated upon settlement of the strike. Such a replacement policy is obviously discriminatory and may tend to discourage union membership. The presence of these factors in and of themselves do not render the policy illegal. The test of its legality is the true purpose, or real motive of the employer. This was clearly the test applied by the Court in the cited case. *Ibid.* The rationale of the *MacKay* case is pertinent in the instant case.

We direct our attention to *NLRB v. California Date Grow. Ass'n*, 259 F. 2d 587 (9th Cir. 1958), and *Olin Mathieson Chem. Corp. v. NLRB*, 232 F. 2d 159 (4th Cir. 1956). The question before the Court in these cases was the legality of a preferential seniority policy. It was found in each case that there was no evidence that the policy was adopted to protect and continue the business. The respective Courts decided that the policies were motivated by a desire to discourage union activities. It should be noted that both Courts applied the test of real motive. The decisions recognize that a preferential policy would be proper under appropriate circumstances.

We reject as unsupportable the rationale of the Board that a preferential seniority policy is illegal however motivated. We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy. Whether the policy adopted by the Company in the instant case was illegally motivated we do not decide. The question is one of fact for decision by the Board.

619 The additional question raised in the petition for review filed by the Union is rendered moot by our decision; we therefore see no reason to discuss it.

The cross-petition for enforcement will be denied.

620 In United States Court of Appeals
for the Third Circuit

No. 13695

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE
WORKERS, LOCAL 613, AFL-CIO, PETITIONER

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13700

ERIE RESISTOR CORPORATION, PETITIONER

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Judgment

June 26, 1962

Before KALODNER, STALEY and SMITH, *Circuit Judges*

This cause came on to be heard upon the petitions of International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO and Erie Resistor Corporation to review and set aside a certain order of the National Labor Relations Board issued against Erie Resistor Corporation on July 31, 1961, ~~and~~ upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel January 26, 1962, and has considered the briefs and the transcript of record filed in this cause. On May 15, 1962, the Court, being fully advised in the premises, handed down its decision denying enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the order of the National Labor Relations Board, dated July 31, 1961, directed against Erie Resistor Corporation, its officers, agents, successors and assigns, be and it hereby is denied.

By the Court,

WILLIAM F. SMITH,
Circuit Judge.

Dated: June 26, 1962.

[File endorsement omitted.]

621 I, Ida O. Creskoff, clerk of the United States Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Joint Appendix (Volumes I and II) and proceedings in this Court in the case of International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO, petitioner, vs. National Labor Relations Board, respondent, No. 13,695; on file and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 2d day of July, 1962.

[SEAL]

IDA O. CRESKOFF,

Clerk of the U.S. Court of Appeals,

Third Circuit.

622 I, Ida O. Creskoff, clerk of the United States Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Petition for Review and Set Aside an Order of the National Labor Relations Board; Motion by International Union of Electrical, Radio and Machine Workers for leave to Intervene; and Answer to Petition for Review and Cross-Petition for Enforcement; in the case of Erie Resistor Corporation, petitioner, vs. National Labor Relations Board, respondent, No. 13,700; on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 6th day of July, 1962.

[SEAL]

IDA O. CRESKOFF,

Clerk of the U.S. Court of Appeals,

Third Circuit.

24

NLRB VS. ERIE RESISTOR CORP. ET AL.

623

Supreme Court of the United States

No. 288, October Term, 1962.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

ERIE RESISTOR CORPORATION, ET AL.

Order allowing certiorari

October 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

Information Contained herein is UNCLASSIFIED

DATE 10/20/2010 BY SP/SP

REF ID: A1234567890

EXPIRATION DATE 10/20/2010

RELEASER SP/SP

RELEASER COMMENTS

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National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, <i>et seq.</i>)	
Section 7	29
Section 8(a)(1), (3), (5)	2, 7, 8, 10, 11, 12, 13, 14, 15

Miscellaneous:

Comment, <i>Legal and Practical Limitations Upon an Employer's Right to Replace Economic Strikers: Herein of Superseniority Plans</i> , 52 N.W.U.L. Rev. 122 (1957)	15
Comment, <i>Strike Superseniority: Valid Extension of NLRB v. Mackay Radio and Telegraph or Violation of Section 8(a)(3) of the NLRA?</i> , 27 U. of Chi. L. Rev. 368 (1960)	15
Note, 70 Harv. L. Rev. 737 (1957)	15
Note, 42 Va. L. Rev. 836 (1956)	15

In the Supreme Court of the United States

OCTOBER TERM, 1962

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

ERIE RESISTOR CORPORATION AND INTERNATIONAL UNION
OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL
613, AFL-CIO

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit entered in this case.

OPINION BELOW

The opinion of the court below (Appendix A, *infra*, pp. 17-26) is not yet reported. The findings of fact, conclusions of law and order of the Board (R. 3a-32a)¹ are reported at 132 NLRB No. 51.

¹ "R." refers to the portion of the record printed as the joint appendix to the briefs in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1962 (Appendix B, *infra*, pp. 27-28). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether it is an unfair labor practice in violation of Section 8(a)(1) and (3) of the National Labor Relations Act for an employer to discriminate between employees who strike and employees who work during a strike by awarding an additional arbitrary seniority credit—in this case 20 years—to replacements for strikers and also to strikers who return to work during the strike, with resulting discrimination, during a subsequent layoff, against strikers who did not return to work until after the strike's termination.²

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix C, *infra*, pp. 29-30.

² The decision of the court of appeals denying enforcement of the Board's order presents the further question whether the Company refused to bargain, in violation of Section 8(a)(5) of the Act, by insisting that this or a similar form of superseniority policy be made a part of any collective bargaining agreement. See footnote 1, *infra*, p. 15.

STATEMENT

I. The Board's Findings of Fact

Early in 1959 the Erie Resistor Corporation and Local 613 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO met to negotiate the terms of a new contract, to become effective on March 31, the expiration date of the then current contract (R. 37a-38a; 73a-75a, 213a-232a).³ The parties were unable to reach agreement and on March 31, 1959, the Union called a strike in support of its contract demands, which was joined by all of the approximately 478 employees working in the unit (R. 4a; 69a-70a, 145a).⁴

Throughout April, the month following the strike, the Company maintained production at approximately 15 to 30 percent of normal by transferring 140 clerical and other non-unit employees to production jobs (R. 4a; 409a-410a, 429a-430a, 451a, 522a). Although the Company had received applications for employment as early as a week or two after the strike began, it did not attempt until the next month to fill the production unit with employees from outside the plant (R. 4a; 393a-394a). On May 3, the Company notified all members of the Union by letter that it intended to begin hiring replacements and that strikers would retain their jobs only until replaced (R. 4a; 230a, 560a-

³ References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

⁴ In addition to the approximately 478 employees who went on strike, 450 employees in the unit were in layoff status (R. 5a, n. 69a-70a).

561a). In accordance with this notice the Company began to hire replacements during the week of May 11, assuring the new employees, after they were accepted for employment, that they would not be discharged or laid off upon settlement of the strike (R. 4a; 174a, 367a).

In a bargaining session held on May 11, the Company told the Union that it was promising replacements job security and that it intended to implement this promise by accordng them some form of superseniority (R. 4a; 120a, 200a-202a).⁵ At five bargaining sessions held between May 11 and May 28, the Company proposed several alternative forms of super-seniority, offering to negotiate the precise nature of the seniority benefit to be accorded replacements but stating that superseniority in some form was "something that management people want and must have" (R. 4a, 21a; 120a, 200a-203a).⁶ The Union opposed the Company's various seniority proposals, contending that no matter what particular form superseniority might take it would necessarily work an illegal discrimination against the strikers (R. 4a; 224a). As significant progress was made in the negotiations on other issues, superseniority became the focal point of disagreement (R. 21a; 219a-222a, 356a).

⁵ When the strike started, a male employee needed seven years seniority to avoid layoff; a female employee, nine years (R. 5a, n. 2; 70a).

⁶ At this time the city of Erie was classified by the United States Department of Labor as an area of severe unemployment; at least 12 percent of the total labor force was unemployed (R. 6a, n. 3; 188a-189a, 587a).

By May 25, the Company had recalled 32 of the employees in layoff status, hired 1 new employee, and put 4 returning strikers to work in the production unit (R. 5a; 522a). On May 28, the Company informed the Union that it had decided to give both replacements and strikers who returned to work during the strike 20 years additional seniority, which would be used only for future layoffs and would not affect vacations or any other employee benefits based on years of service (R. 5a, 120a, 211a, 565a).⁷ At a union meeting on May 29, the strikers unanimously resolved to continue striking "until management stops its unfair labor practice by making us agree to * * * super-seniority [for] the seabs" (R. 6a; 274a). That weekend, May 30 and 31, the Union publicized the Company's 20-year superseniority plan over the local television station (R. 6a; 173a).

By the end of the first week in June, the Company had hired a total of 57 replacements and reinstated 8 returning strikers (R. 522a). During that same week, the Company and Union reached agreement on several seniority provisions which had been in dispute, but superseniority remained in issue (R. 6a; 126a-127a). On June 10, the Company wrote a letter to all employees and members of the Union, making its first announcement to them of the 20-year superseniority plan (R. 6a; 130a-131a). Although the Union offered to give up union security if the Company would abandon superseniority or go to arbitration on the question, and threatened to continue striking if it did not, the Com-

⁷ The Company did not publicize this plan until June 10, terming it "confidential" until that date (R. 6a; 344a).

pany position remained firm and no agreement was reached (R. 6a; 332a-333a).

By June 14, 81 replacements (47 employees recalled from layoff status and 34 new employees) and 23 returning strikers had accepted production unit jobs (R. 7a; 394a-395a, 522a). On June 15, the Company posted the 20-year superseniority plan on its bulletin board (R. 7a; 122a). In the following week, 64 strikers returned to work and 21 replacements took jobs in the unit, bringing the total number of replacements to 102 and returned strikers to 87 (R. 7a; 394a-395a, 522a). When the number of returned strikers went up to 125 in the week beginning June 22, the Union decided it had to settle the strike. It offered to withdraw the picket line and submit the superseniority issue to the Board, and the parties drew up a tentative agreement on the remaining economic issues (R. 7a; 212a-214a, 522a). Although the Company notified the Union on the evening of June 24 that it would not accept the terms of the tentative agreement, the Union, on June 25, nonetheless called an end to the strike and requested reinstatement for the strikers (R. 7a; 43a, 166a, 212a-216a, 567a).

The next day the Company gave the Union a list of 129 strikers whom the Company would not reinstate because their jobs had been filled by replacements (R. 7a; 228a-229a).⁸ In the next few weeks following the strike's termination, the Union received approximately 173 resignations from membership (R. 16a; 260a-263a).

⁸ The Company had received approximately 300 job applications which had not yet been processed at the strike's end (R. 6a; 392a-393a).

On July 17, 1959, the parties executed a settlement agreement, providing that the propriety of the "Company's replacement and job assurance policy" should be "resolved by the NLRB and the Federal Courts" and should "remain in effect pending final disposition" (R. 7a-8a; 578a). The Company and Union also executed a new contract on this date, including among other things a provision requiring maintenance of membership for those employees remaining in the Union on August 14, 1959 (R. 8a; 316a; 580a).

Following the strike's termination, the Company began to reinstate those strikers who had not been replaced, recalling them on the basis of seniority, with several exceptions not in issue here (R. 7a; 411a-412a). In September 1959, the Company's production unit work force reached a high of 442 employees (R. 7a; 399a-400a; 523a). Economic layoffs in succeeding months, however, gradually reduced the work force to 240 by May 1960 (R. 7a; 399a-400a, 524a). A large number of employees laid off during this cut-back period were reinstated strikers whose seniority concededly became insufficient to retain employment solely as a result of the Company's super-seniority policy (R. 7a; 176a).

II. The Board's Conclusions and Order

On the foregoing facts, the Board held that the Company's policy of granting 20 years superseniority for replacements and returning strikers violated Section 8(a)(3) and (1) of the Act, irrespective of the Com-

pany's possible economic justification therefor (R. 18a-19a).⁹ In the Board's view, since the policy discriminated against employees solely on the basis of their strike activity, discouragement of that activity was "inescapable and demonstrable." Thus, as in *Gaynor News*,¹⁰ where union membership was the basis of a wage disparity between employees, discrimination within the meaning of Section 8(a)(3) was established without a showing that the employer subjectively intended to discourage union activity. Nor, in the Board's view, was the discrimination privileged by *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333,¹¹ for superseniority is a form of discrimination extending far beyond the employer's right of replacement sanctioned by *Mackay*" (R. 11a). Having found that the superseniority arrangement violated Section 8(a)(3) of the Act, the Board further concluded that the Company refused to bargain, in violation of Section 8(a)(5), by insisting, as a condition to reaching a collective bargaining agreement with the Union, that the agreement contain a clause ratifying the Company's grant of superseniority (R. 20a-21a).

The Board, *inter alia*, ordered the Company to rescind its superseniority policy and to reinstate with backpay any recalled strikers laid off solely as a result of the policy;¹² to bargain with the Union upon request; and to post appropriate notices (R. 25a-26a).

⁹ The Board, therefore, declined to pass on the Company's contention that it was economically necessary to institute superseniority in order to obtain striker replacements (R. 19a, p. 29).

¹⁰ This is one of the cases involved in *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17.

¹¹ The Board also found that on May 29, when the Union voted

III. The Decision of the Court of Appeals

The court of appeals declined to enforce the Board's order, relying on the decisions of this Court in *Radio Officers* and *Mackay, supra*, and in *Local 357, Teamsters v. National Labor Relations Board*, 365 U.S. 667. The court below concluded that a preferential seniority policy could not be found to violate the Act absent a finding that the employer's "true purpose or real motive" was to discourage union activity rather than to keep its plant operating during the strike. The court stated (App. A, *infra*, p. 26):

We reject as unsupportable the rationale of the Board that a preferential seniority policy is illegal however motivated. We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy. * * *

to continue striking until the Company stopped insisting on seniority, *supra*, p. 5; the strike became an unfair labor practice strike. Accordingly, the strikers not replaced by that date were unlawfully discriminated against when the Company denied their unconditional offer to return to work on June 25, 1959 (R. 20a-22a). To remedy this further discrimination, the Board ordered the Company to offer reinstatement to strikers who had not been replaced by May 29 and who offered to return on June 25, and to compensate such strikers for any loss in wages attributable to the June 25 refusal (R. 23a-24a).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that an employer may properly grant superseniority to replacements for strikers and returning strikers (and thereby reduce the relative seniority of those employees who elect to remain on strike), so long as he is motivated by a desire to keep his plant operating, and not to penalize the strikers, is in direct conflict with that of the Sixth Circuit in *Swarco Inc. v. National Labor Relations Board*, No. 14753, decided May 23, 1962 (set forth in Appendix D, *infra*, pp. 31-40). In *Swarco*, the Board, relying upon its decision in the instant case, concluded that an award of superseniority to returning strikers violated Section 8(a)(3) and (1) of the Act, irrespective of the employer's motive (13 NLRB No. 31). The Sixth Circuit affirmed the Board's decision, stating that, although "an employer has a right to keep his plant in operation during an economic strike, an honest motive alone for that purpose is not enough" to privilege discrimination, the natural consequence of which is to discourage strike activity (App. D, *infra*, p. 40).¹² This conflict of decisions requires resolution by this Court, particularly since, as we show *infra*, pp. 14-15, the question is a recurring one in the administration of the Act.¹³

¹² The decision below is in accord with that of the Ninth Circuit in *National Labor Relations Board v. Potlatch Forests, Inc.*, 189 F. 2d 82. There, the employer, at the conclusion of an economic strike, accorded superseniority to those who had worked during the strike; this caused several strikers, reinstated after the strike, to be laid off. The Board found the superseniority policy was discriminatory in violation of Section 8(a)(3) and (1) of the Act. 87 NLRB 1193. The Ninth Circuit, finding that there was an economic justification for the policy, declined to enforce the Board's order.

¹³ On the basis of an asserted conflict with *Potlatch*, this Court

2. The decision below rests on an erroneous interpretation of decisions of this Court.

(a) The court below reads *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, and *Local 357, Teamsters v. National Labor Relations Board*, 365 U.S. 667, as holding that discriminatory action does not violate Section 8(a)(3) of the Act, even though it tends to discourage or encourage union activity, absent specific proof that the action was motivated by such a consideration; and that if the discrimination is motivated by valid economic considerations (e.g., the necessity to keep a plant in operation), there is no violation no matter how much union discouragement or encouragement flows from it. Those cases do not so hold; on the contrary, they support the Board's position. In *Radio Officers*, this Court pointed out that, although a purpose to encourage or discourage was necessary to establish a violation of Section 8(a)(3), such a purpose need not be specifically proved in every case. Where the discrimination is of a kind that encouragement or discouragement of union activity is a natural consequence, "an employer's protestation that he did not intend to encourage or discourage must be unavailing," for "it is presumed that he intended such

granted certiorari in *Olin Mathieson Chemical Corp. v. National Labor Relations Board*, 232 F. 2d 158, where the Fourth Circuit had sustained the Board's holding (114 NLRB 486) that the grant of superseniority to replacements and returning strikers violated Section 8(a)(3) and (1) of the Act. However, when it subsequently appeared that the holding in *Olin Mathieson* rested on a finding that the grant of superseniority was motivated by a desire to penalize the strikers and not by economic considerations, the decision of the Fourth Circuit was affirmed *per curiam*, without reaching the issue presented here. 352 U.S. 1020.

consequence" (347 U.S. at 44-45). The Court expressed the same view in *Local 357*, stating that, although it is "the 'true purpose' or 'real motive' in hiring or firing that constitutes the test" of whether there is a violation of Section 8(a)(3), some "conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference" (365 U.S. at 675).

Gaynor News, which was one of three cases disposed of in the *Radio Officers* opinion, illustrates this principle. There the Company granted retroactive wage increases to employees who were members of the union and declined to give such benefits to other employees in the same bargaining unit because they were not union members. The Company did not intend, by this disparate action, to encourage union membership, nor was it otherwise illegally motivated. It "refused to make similar payments to any of its nonunion employees on the grounds that it was not contractually bound to do so,"¹⁴ and, in its business judgment, did not choose to do so" (347 U.S. at 35-36).¹⁵ Nevertheless, this Court sustained the Board's finding that the Company's action constituted discrimination in violation of Section 8(a)(3) of the Act, for "a natural consequence of discrimination, based solely on union membership * * * is * * * encouragement of membership in such union" (347 U.S. at 46).

¹⁴ The union had, by contract, obtained the wage increases for its members ~~only~~.

¹⁵ The Court added that the Board "concedes that the employer acted from self-interest and not to encourage unionism" (347 U.S. at 37).

The situation here is similar to that in *Gaynor*. Here, as there, union considerations were the basis for treating employees differently; i.e., the employees here suffered a reduction in relative seniority solely because they elected to remain out on strike in support of the Union's bargaining demands. The natural consequence of discriminating among employees on the basis of whether they continued to support the strike called by their bargaining representative is to discourage union membership and activity.¹⁶ Accordingly, irrespective of subjective good faith or possible economic justification, the Company's superseniority policy violated Section 8(a) (3) of the Act.¹⁷

(b) The reliance of the court below on *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, is misplaced. That case holds that, in an economic strike, an accommodation must be made between the right to strike and the employer's legiti-

¹⁶ The Board found that this was the result here. It noted that following the strike there were some 173 resignations from the Union, and stated, "It is hard to conceive of continued effective collective bargaining under these circumstances" (R. 16a; 260a-263a).

¹⁷ In the concurring opinion in *Local 357*, 365 U.S. 667, 677, 680-681, relied upon by the court below (App. A, *infra*, pp. 22-23), two members of the Court suggested that the only time when proof of an intent to encourage or discourage union membership can be dispensed with is when there is no "significant business justification" for the employer's acts. Although *Gaynor* is an exception to this principle, it was explained on the further ground that the employer "was prevented from asserting the justifying business reasons for thus encouraging union membership because of his complicity in the union's breach of its duties as agent for all the employees" (*id.* at 681). We submit that the rationale set forth in the concurring opinion does not fully accord with the principles enunciated in *Radio Officers'* and reemphasized in the opinion for the Court in *Local 357*; nor is there any suggestion in the Court's opinion in *Gaynor* that it rests on the narrow ground advanced by the concurring Justices.

mate interest in ruining his business. Therefore, the employer may, without violating the Act, obtain permanent replacements for the strikers. This limited privilege, however, does not sanction a grant of super-seniority to replacements and strikers who abandon the strike. Such a policy affects all strikers, whether replaced or not, and its impact continues long after the strike has ended. It divides the labor force into two groups—those whose jobs are less secure because they remained loyal to the strike and those whose job security has been enhanced because they returned to work before the strike was over (see R. 1a-16a). As the Sixth Circuit recognized in *Swarco* (App. D, *infra*, pp. 34-35), nothing in *Mackay* permits a policy which results in such discrimination.

3. The question whether an employer may, without violating Section 8(a)(3) of the Act, reduce the seniority status of employees who elect to remain on an economic strike has been a problem of increasing importance in the administration of the Act.¹⁸ It has evoked

¹⁸ See *Potlach Forests Inc.*, 87 NLRB 1193 (1949), enforcement denied, 189 F. 2d 82 (C.A. 9); *Olin Mathieson Chemical Corp.*, 114 NLRB 486 (1955), enforced, 232 F. 2d 158 (C.A. 4), affirmed, 352 U.S. 1020; *California Date Growers Ass'n*, 118 NLRB 246 (1957), enforced, 259 F. 2d 587 (C.A. 9); *Ballas Egg Products*, 125 NLRB 342 (1959), enforced, 283 F. 2d 871 (C.A. 6); *Swan Rubber Co.*, 133 NLRB No. 31 (1961), enforced, May 23, 1962, 50 LRRM 2262, Docket No. 14753 (C.A. 6); *Griffin Pipe Division of Griffin-Wheel Co.*, 136 NLRB No. 144 (1962), pending on petition to review (C.A. 7). Cf. *United Shoe Machinery Corp.*, 96 NLRB 1309, 1313-1314 (1951); *Lewin-Mathes Co.*, 126 NLRB 936, 939, 951 (1960), enforcement denied, 285 F. 2d 329, 333 (C.A. 7). See also, *Paper, Calmenson and Co.*, 26 NLRB 553, 557 (1940); *Precision Castings Company*, 48 NLRB 870, 879-881 (1943); *Indiana Desk Co.*, 56 NLRB 76, 78-79 (1944); *General Electric Company*, 80 NLRB 510, 512 (1948).

wide interest and comment.¹⁹ A resolution of the problem by this Court will remove the uncertainty which has arisen as to the propriety of this technique, and also enable the Court further to clarify the meaning and scope of its decisions in *Radio Officers*, Local 357, and *Mackay*.²⁰

¹⁹ See, e.g., Comment, *Strike Superseniority: Valid Extension of NLRB v. Mackay Radio and Telegraph or Violation of Section 8(a)(3) of the NLRA?*, 27 U. of Chi. L. Rev. 368 (1966); Comment, *Legal and Practical Limitations Upon an Employer's Right to Replace Economic Strikers: Herein of Superseniority Plans*, 52 N.W.U. L. Rev. 422 (1957); Note, 70 Harv. L. Rev. 737 (1957); Note, 42 Va. L. Rev. 836 (1956).

²⁰ In finding that "nothing in the Act *** proscribes" (App. A, *infra*, p. 26) the Company's preferential seniority policy, the court of appeals also rejected, without discussion, the Board's holding that the Company's insistence on the policy as a condition of negotiating an agreement with the Union constituted a violation of Section 8(a)(5) of the Act (see Statement, *supra*, pp. 8-9, n. 11; R. 20). In the event this Court determines that the superseniority policy is an unlawful form of discrimination proscribed by Section 8(a)(3) and (1), the subsidiary ruling of the court of appeals with respect to the Board's finding of a Section 8(a)(5) violation should also be reversed. *National Labor Relations Board v. Wooster Division of Borg-Warner*, 356 U.S. 342.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARCHIBALD COX,

Solicitor General.

STUART ROTHMAN,

General Counsel,

DOMINICK L. MANOLI,

Associate General Counsel,

NORTON J. COME,

Assistant General Counsel,

MARION L. GRIFFIN,

Attorney,

National Labor Relations Board.

July 1962.

APPENDIX A**UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

No. 13,695

**INTERNATIONAL UNION OF ELECTRICAL, RADIO AND
MACHINE WORKERS, LOCAL 613, AFL-CIO, PETI-
TIONER,**

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13,700

ERIE RESISTOR CORPORATION, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT**On Petitions for Review and Cross-Petition to Enforce
an Order of the National Labor Relations Board**

Argued January 26, 1962

Before KALODNER, STALEY and SMITH, *Circuit Judges***OPINION OF THE COURT**

(Filed May 15, 1962)

By SMITH, *Circuit Judge.*

This case is before the Court upon petitions for review filed by the Erie Resistor Corp. (the Company), and Local 613, I.U.E., AFL-CIO (the Union), and a cross-petition filed by the National Labor Relations Board (the Board) for the enforcement of its final

order. These petitions were filed under Sections 10(f) and (e) of the Labor Management Relations Act, 1947, 29 U.S.C.A. 160(f) and (e). The essential facts are not in dispute and the jurisdiction of this Court is conceded.

FACTS

The Company maintained a manufacturing plant at Erie, Pennsylvania, where it was engaged in the manufacture and sale of electronic components, electro-mechanical assemblies, and custom molded plastics. The production and maintenance workers of the Company were, and had been since 1951, represented by the Union. There had been in force and effect successive collective bargaining agreements, the last of which was terminated on March 31, 1959.

Approximately two months prior to the termination of the then existing agreement, the Union notified the Company of its desire to enter into negotiations in anticipation of a new contract. The negotiators for the respective parties met from time to time thereafter but were unable to reach full agreement. When the existing agreement terminated on March 31, 1959, a strike was called. It is here admitted that at its inception the strike was economic. When the strike was called there were 478 production and maintenance workers actively employed and 450 on layoff status; of those on layoff status, approximately 400 had no reasonable expectation of being recalled. All of the workers actively employed joined the strike.

The Company attempted to maintain production operations during the month of April by using clerical employees and other personnel outside the bargaining unit. Production declined to a level between 15% and 30% of normal, and several customers cancelled their orders with the Company. On May 3, 1959, each of

the strikers was notified by letter that the Company intended "to obtain replacements"; they were further notified that they would hold their positions only until replaced. The hiring of replacements commenced on May 11, and continued thereafter until June 24, 1959. The replacements included new employees, employees on layoff status, and returning strikers. When the applicants were accepted they were told that they would not be laid off or discharged by reason of the settlement of the strike.

When the negotiators met on May 11, 1959, the representatives of the Union were informed that replacements were being assured that they would not be discharged upon settlement of the strike. The Company, prompted by a desire to implement its assurances, proposed that the existing seniority system be so modified as to accord the replacements some form of preferential seniority. The Company offered to consider any plan acceptable to the Union, but the offer was rejected. The subject was discussed at five sessions held between May 11th and May 28th. The representatives of the Union remained adamant in their refusal to consider it on the ground that a preferential seniority system would be discriminatory and illegal.

On May 27, 1959, the Company formulated a preferential seniority plan under which twenty years were added to the regular length of service of all production and maintenance workers who accepted employment during the strike. The plan was limited in its application to future layoffs and recalls from layoff. The Union was informed of the plan on the following day and publicized it in radio and television broadcasts on May 30th and 31st. The strikers were informed by letter addressed to each of them by the Company on June 10th; copies of the plan were posted on the company bulletin boards on June 15th. Notwithstanding the for-

mulation of a preferential seniority policy, the Company expressed a willingness to consider any alternative plan proposed by the Union.

The strike ended on June 25, 1959, after the Union withdrew the picket line and offered to submit the seniority issue to the Board. Thereafter the strikers who had not been replaced were recalled by the Company in the order of seniority. By July 5th, 358 production and maintenance workers had returned to work; this number increased to 442 by September 20th. Thereafter, between September of 1959 and May of 1960, 202 employees were laid off for economic reasons; many of these were recalled strikers whose seniority was insufficient only because of the operation of the preferential seniority plan.

DECISION AND ORDER OF THE BOARD

The Trial Examiner concluded that under the applicable decisions a preferential seniority policy cannot be held illegal in the absence of proof that its adoption was prompted by a wrongful motive. He found that the evidence was "wholly inadequate" to support a factual determination that the adoption of the preferential seniority policy here in question was prompted by an illegal motive, and recommended dismissal of the complaint. The Board rejected the conclusion of the Trial Examiner and held "that superseniority HOWEVER MOTIVATED [is] an illegal discrimination against strikers."¹ (Emphasis by this Court).

¹ This was admittedly the rationale of the Board in the Matter of POTLATCH FORESTS, INC., et al., 87 NLRB 1193 (1949). See Decision and Order of the Board, Joint Appendix 10a. This rationale was rejected, and enforcement of the Board's Order was denied by the Court of Appeals. N.L.R.B. v. POTLATCH FORESTS, 189 F.2d 82 (9th Cir. 1951).

The Board found: first, that the preferential seniority policy was inherently discriminatory and that its adoption was an unfair labor practice within the meaning of Sections 8(a)(3) and (1) of the Act, 28 U.S.C.A. 158(a)(3) and (1); second, that the layoff of recalled strikers was discriminatory and violated the said sections; third, that the Company's insistence upon a preferential seniority plan as a condition to settlement was tantamount to a refusal to bargain and an unfair labor practice within the meaning of Section 8(a)(5) of the Act, 28 U.S.C.A. 158(a)(5); and fourth, that the said conduct converted the strike into an unfair labor practice strike as of May 29, 1959, and, therefore, the refusal to reinstate all strikers upon termination of the strike was likewise a violation. The order directed the Company to cease and desist from the practices found to be illegal, and to take affirmative action consistent with the Board's decision.

DISCUSSION

We concede that the application of a preferential seniority policy may be discriminatory and may tend to discourage union membership. The narrow question before us for decision is whether such a policy **HOWEVER MOTIVATED** is illegal.

An employer in the ordinary management of his affairs may be required to make business decisions discriminatory in their probable consequences. Such discrimination is not in and of itself illegal. The discrimination proscribed by Section 8(a)(3) as an unfair labor practice is that which is motivated by a desire "to encourage or discourage membership in a labor organization."

The Supreme Court has consistently held that the discriminatory conduct of an employer is not unlawful in the absence of an illegal motive. TEAMSTERS

LOCAL v. LABOR BOARD, 365 U.S. 667 (1961); **RADIO OFFICERS v. LABOR BOARD**, 347 U.S. 17 (1954); **LABOR BOARD v. MACKAY CO.**, 304 U.S. 333 (1938); **LABOR BOARD v. JONES & LAUGHLIN**, 301 U.S. 1 (1937). The Court has adhered to the view that motivation is a relevant factor and the test of the employer's conduct. *Ibid.*

The case of **TEAMSTERS LOCAL v. LABOR BOARD**, *supra*, is pertinent. The matter came before the Board on a complaint which charged that an exclusive hiring agreement between an employer and a union violated Sections 8(a)(3) and (1). The agreement was held illegal on the ground that it inherently and unlawfully encouraged union membership.² The decision of the Board was sustained by the Court of Appeals.³ The decision of the Court of Appeals was reversed by the Supreme Court. While the ultimate decision of the latter Court appears to rest on other grounds, the majority opinion reiterates that "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." **TEAMSTERS LOCAL v. LABOR BOARD**, *supra* at page 675.

The relevance of motive as a determinative factor is discussed at length in the concurring opinion of Mr. Justice Harlan, with whom Mr. Justice Stewart concurred, 365 U.S. 667, 677-685. It is therein stated, at page 679:

"What in my view is wrong with the Board's position in these cases is that A MERE SHOWING OF FORESEEABLE ENCOURAGEMENT OF UNION STATUS IS NOT A SUFFICIENT BASIS FOR A FINDING OF VIOLATION of the statute. It has long been recognized

² **LOS ANGELES-SEATTLE MOTOR EXPRESS, INCORPORATED**, et al., 121 NLRB 1629 (1958); see also **MOUNTAIN PACIFIC CHAPTER**, etc., 119 NLRB 883 (1957).

³ **LOCAL 357, INTERNATIONAL BROTHERHOOD**, etc. v. NLRB, 275 F.2d 646 (D.C. Cir. 1960).

that an employer can make reasonable business decisions, UNMOTIVATED BY AN INTENT TO DISCOURAGE UNION MEMBERSHIP OR PROTECTED CONCERTED ACTIVITIES, although the foreseeable effect of these decisions may be to discourage what the act protects.' (Emphasis by this Court).

Mr. Justice Harlan went on to say, at page 680: "In general, this Court has assumed that a finding of a violation of § 8(a)(3) or § 8(b)(2) requires an affirmative showing of a MOTIVATION of encouraging or discouraging union status or activity."

We are of the opinion that RADIO OFFICERS v. LABOR BOARD, supra, lends support to our point of view.⁴ We refer particularly to NLRB v. GAYNOR NEWS Co., 347 U.S. 17, 34. Therein the employer and the union were parties to an agreement under which the union was recognized as the exclusive bargaining agent for both union and non-union employees. Pursuant to the terms of a supplementary agreement, retroactive wage increases were granted to union employees but denied non-union employees; gratuitous vacation benefits were granted and denied on the same basis.

The matter came before the Board⁵ on a complaint which charged the employer and the union with a violation of Sections 8(a)(3) and (1). The only answer offered by the employer was that the retroactive wage payments and gratuitous benefits had been paid under the compulsion of a legally binding contract. The Board concluded, as did the Trial Examiner, that the contract afforded no defense to the charge. We agree with this conclusion. The Board held that the disparate treatment of the employees on the basis of union

⁴ Three cases were consolidated for hearing and disposition.

⁵ GAYNOR NEWS Co. Inc., et al., 93 NLRB 299 (1951).

membership foreseeably encouraged union membership and was therefore a violation of the pertinent sections under which the employer and the union were charged.

The view of the Board was sustained by the Supreme Court, which held that the evidentiary facts, absent proof of a valid business reason, were sufficient to support an inference that the disparate treatment of the employees was intended to encourage union membership. The Court said, at page 46: "No more striking example of discrimination so foreseeably causing employee response as to obviate the need for any other proof of intent is apparent than the payment of different wages to union employees doing a job than to non-union employees doing the same job."

The Court held, at page 47, "that in the circumstances of this case, the union being exclusive bargaining agent for both member and nonmember employees, the employer could not, without violating § 8(a)(3), discriminate in wages solely on the basis of such membership even though it had executed a contract with the union prescribing such action. Statements throughout the legislative history of the National Labor Relations Act emphasize that exclusive bargaining agents are powerless 'to make agreements more favorable to the majority than to the minority.' Such discriminatory contracts are illegal and provide no defense to an action under § 8(a)(3)."

The Supreme Court held: "that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3),"⁶ but

⁶ We recognize, as did the Supreme Court in the cited case and in other cases, the right of the Board to draw an inference of unlawful motive in the absence of evidentiary facts to support an inference to the contrary.

it did not disregard motivation as a relevant factor. The Court said:

"The relevance of ~~the~~ motivation of the employer in such discrimination has been consistently recognized under both § 8(a)(3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, LABOR BOARD v. JONES & LAUGHLIN STEEL CORP., 301 U.S. 1, in which we upheld the constitutionality of § 8(3), we said with respect to limitations placed upon employers' right to discharge by that section that 'the [employer's] true purpose is the subject of investigation with full opportunity to show the facts.' ID., at 46. In another case the same day we found the employer's 'real motive' to be decisive and stated that 'the act permits a discharge for any reason other than ~~union~~ activity or agitation for collective bargaining with employees.' " RADIO OFFICERS v. LABOR BOARD, supra, at page 43.

It was established by LABOR BOARD v. MACKAY, supra, that an employer, TO PROTECT AND CONTINUE HIS BUSINESS, may replace strikers during the strike and assure the replacements that their employment will not be terminated upon settlement of the strike. Such a replacement policy is obviously discriminatory and may tend to discourage union membership. The presence of these factors in and of themselves do not render the policy illegal. The test of its legality is the true purpose, or real motive, of the employer. This was clearly the test applied by the Court in the cited case. Ibid. The rationale of the MACKAY case is pertinent in the instant case.

We direct our attention to NLRB v. CALIFORNIA DATE GROW. Ass'n., 259 F.2d 587 (9th Cir. 1958), and OLIN MATHIESON CHEM. CORP. v. NLRB, 232 F.2d 159 (4th

Cir. 1956). The question before the Court in these cases was the legality of a preferential seniority policy. It was found in each case that there was no evidence that the policy was adopted to protect and continue the business. The respective Courts decided that the policies were motivated by a desire to discourage union activities. It should be noted that both Courts applied the test of real motive. The decisions recognize that a preferential policy would be proper under appropriate circumstances.

We reject as unsupportable the rationale of the Board that a preferential seniority policy is illegal however motivated. We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy. Whether the policy adopted by the Company in the instant case was illegally motivated we do not decide. The question is one of fact for decision by the Board.

The additional question raised in the petition for review filed by the Union is rendered moot by our decision; we therefore see no reason to discuss it.

The cross-petition for enforcement will be denied.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit.*

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13695

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 613, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

No. 13700

ERIE RESISTOR CORPORATION, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

DECREE

Before KALODNER, STALEY and SMITH, *Circuit Judges:*

THIS CAUSE came on to be heard upon the petitions of International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO and Erie Resistor Corporation to review and set aside a certain order of the National Labor Relations Board issued against Erie Resistor Corporation on July 31, 1961, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel January 26, 1962, and has considered the briefs and the transcript of record filed in this cause. On May 15, 1962, the Court, being fully advised in the premises, handed down its decision denying enforcement of the Board's order. In conformity therewith, it is hereby



ORDERED, ADJUDGED AND DECREED that the order of the National Labor Relations Board, dated July 31, 1961, directed against Erie Resistor Corporation, its officers, agents, successors and assigns, be and it hereby is denied.

A TRUE COPY

IDA O. CRESKOFF,
Clerk:

BY THE COURT,
WILLIAM F. SMITH,
Circuit Judge.

DATED: June 26, 1962.

APPENDIX C

The National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U.S.C. 151, *et seq.*) provides in pertinent part:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair

labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

APPENDIX D

No. 14753

UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT* SWARCO, INC. (Swan Rubber Company Division of
Amerace Corporation), PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

On Petition to Review and Set Aside, and on Request
for Enforcement of, an Order of the National Labor
Relations Board.

Decided May 23, 1962

Before: CECIL and WEICK, *Circuit Judges*, and STARR,
Senior District Judge.

CECIL, Circuit Judge. This case is before the Court upon the petition of Swarco, Inc., to review and set aside an order of the National Labor Relations Board issued against it on September 26, 1961. The National Labor Relations Board hereinafter called the Board, Respondent, filed an answer in which it requested enforcement of its order. (133 N.L.R.B. No. 31.)

The matter was submitted to the Trial Examiner upon a stipulation of facts and the oral testimony of four witnesses. The facts may be briefly summarized as follows:

The petitioning employer at the time this cause of action arose operated two plants, one in Bucyrus, Ohio, and one in Carey, Ohio. Local 267 of the Rubber Workers Union had represented the employers at

Bucyrus since 1957. The employees at Carey had been represented by Local 414 of the Rubber Workers Union since 1950. There were separate bargaining units for the two plants whose contracts expired about May 1, 1960. Negotiations which had begun in March broke down over issues of union shop, checkoff and arbitration. On Sunday, May 8, 1960, the two locals struck their respective plants.

The petitioner at Bucyrus was the exclusive producer of special hose products for an automotive manufacturer and other companies and it being in the height of the season, the employer was concerned over the possibility of losing these accounts. The petitioner decided to open the Bucyrus plant immediately. Accordingly, the plant was opened on May 9th and on the first day of opening a substantial number of employees crossed the picket line and went to work. The reporting employees were told that they could have any available job for which they were competent and that they would be protected against bumping or future layoffs, regardless of previous seniority, as against striking employees who did not return to work before the end of the strike. This preferred seniority was to be applicable to these employees only so long as they remained on the jobs which they chose at the time. The non-striking employees were told to inform the strikers of the employer's promise of superseniority, if they returned to work. Supervisors of the petitioner visited the picket line, in person, and informed the strikers of the offer of superseniority and job transfer.

Additional employees abandoned the strike and returned to work at the Bucyrus plant within the next four days. No new replacements were hired and Local 267 called off the strike a week after it began. Subsequently, in the course of economic layoffs, approximately nineteen of the former strikers were laid off

solely because of their reduced seniority under the plan adopted by the employer during the strike. These laid-off employees are the subject of the Board order now before us.

At the time of the strike, the Carey plant had built up a substantial surplus of manufactured products and the employer made no effort to operate that plant until June 2, 1960. On that date the petitioner sent a letter to the Carey employees and offered to them the same superseniority and choice of jobs that was offered to the employees at the Bucyrus plant. This offer was repeated in another letter dated July 8th.

Approximately seventy-five employees returned to work. In addition one hundred seven new employees were hired during the strike. The superseniority offer did not apply to the new replacements. In subsequent negotiations Carey, Local 414, agreed to accept the superseniority policy until June 1, 1961, if the returned strikers who were the beneficiaries of this policy would agree to go back to their old jobs. The returned strikers rejected this by secret ballot on July 16th. The strike was called off on July 23rd. One employee at Carey was laid off on September 19, 1960, solely as a result of his reduced seniority under the respondent's plan. Subsequent to the end of the strike, the union at Bucyrus was decertified by a vote of the employees. In August, 1960, a decertification petition was filed, by certain employees, on the Carey plant. This matter is still pending.

The amended complaint charged that the petitioner violated sections 8(a)(1) and (3) of the National Labor Relations Act (Section 158(a)(1)(3), Title 29 U.S.C.) by offering and granting superseniority to the strikers at its two plants, if they abandoned the strike and returned to work.

The Trial Examiner, in his intermediate report, recommended that the complaints be dismissed. He found that the strike was an economic one and that the employer was motivated by a sincere desire to keep its plants in operation and not to punish the strikers and that its conduct was based on legitimate economic reasons and, therefore, not violative of the Labor Act. In support of this conclusion he relied on *N.L.R.B. v. Potlatch Forests, Inc.*, 189 F. 2d 82, C.A. 9.

The general counsel filed exceptions to the intermediate report and the case was reviewed by the Board. The Board reversed the Trial Examiner and found that the petitioner violated sections 8(a)(1) and (3) of the Act by offering and granting superseniority to strikers at its Bucyrus and Carey plants. The Board further found that the petitioner violated these sections by laying off a number of recalled strikers solely as a result of their reduced seniority under the superseniority plan. The Board relied on *Erie Resistor Corporation*, 132 N.L.R.B. No. 51, in support of its conclusion. This case is now pending on appeal in the Third Circuit.

It is conceded that under the doctrine of *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345, the employer could have hired new employees as replacements of its regular employees, in order to keep its plant in operation and that it would not have to discharge these replacements after the strike, in order to put the strikers back to work. It is argued on behalf of the employer that if new employees could be hired, as replacements, there is no reason why its own employees could not be put to work as replacements for the strikers.

In reversing the Trial Examiner, the Board did not find that he erred in his findings of fact that the employer did not act to punish the strikers or that it was motivated by a sincere desire to keep its plant in operation in the face of an economic strike. The Board based

its reversal on the Erie Resistor case, *supra*. In that case, the Board held that the granting of superseniority to strikers and strike replacements, in order to induce them to abandon a strike and return to work, was a form of discrimination beyond the purview of an employer's right to replace economic strikers as sanctioned by the Mackay Radio case.

The facts of this case do not bring it within the ambit of the *Mackay* case. The question posed here is whether, under the facts of this case, the granting of superseniority is a violation of sections 8(a)(1) and (3) of the Labor Act. (Section 158(a)(1)(3), Title 29 U.S.C.)

We do not consider that *N.L.R.B. v. Potlatch Forests, Inc.*, 189 F. 2d 82, C. A. 9, is dispositive of the case at bar. In *Potlatch*, the union and the employer disagreed over wage differentials in renewing their contract and the union called a strike in August 1947. Near the end of August, the employer was able to resume operations by gradually accumulating both new employees and old employees who crossed the picket line. When the strike was later terminated, the replacements numbered about 1750 out of a normal complement in the bargaining unit of 2600.

The strike being hopelessly lost, the union began negotiations to settle it on October 10, 1947. In the course of these negotiations, the employer vigorously contended for protection of job security of the replacements as against those who would return upon the termination of the strike. The union as vigorously maintained that the seniority rights of the strikers should be preserved. The strike was settled on October 13th and immediately the employer drafted, in writing, the strike seniority policy which gave rise to the action of the Board. The essence of this policy was that the employees who came to work after October 13th were to be laid off ahead of those replacements who were

working before that date, in the event a reduction in force should become necessary.

Potlatch maintained this seniority policy without deviation and on February 18, 1949, the International Woodworkers of America, Local 10-364, filed charges against the employer of violation of section 8(a)(1) and (3) of the Act. The Board found a violation of this section 8(a)(3), on the basis that it provides, "that 'it' shall be an unfair labor practice for an employer * * * by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * * " (p. 84).

The court for the Ninth Circuit considered that the sole question for determination was whether the acts charged constituted discrimination under section 8(a)(3) of the Act. A simple "economic strike" being involved, an unfair labor practice could not be sustained unless it was found that the maintenance of the seniority policy was in and of itself an unfair labor practice. (p. 85)

The court found that there was no discrimination between union and non-union members on the basis of union membership. The only discrimination charged was between the replacements, some of whom were strikers returned to work before the strike ended, and the strikers who returned to work after the termination of the strike.

The court held "In the instant case, therefore, the 'discrimination' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting to protect and continue his business by supplying places left vacant by strikers." Hence, we think the specific ques-

tion posed here has been answered by the Supreme Court by recognizing that an employer attempting to fill a number of positions must be able to offer a substantial degree of security (as well as attractive wages), and that an employer may properly assure the replacements that 'their places might be permanent.' If there are not enough jobs to go around at the time the strike is settled the rights of replacements prevail over strikers." p. 86.

The record does not disclose that the employer promised or assured the replacements that their jobs would be permanent at the time they were employed. Neither is it shown that the employer promised seniority to the employees in order to get them to return to work and abandon the strike.

In *Olin Mathieson Chemical Corporation v. N.L.R.B.*, 232 F. 2d 158, C. A. 4, affirmed 352 U. S. 1020, the Board found in agreement with the Trial Examiner that the employer changed its seniority policy after the strike so as to give preference to employees who had worked during the strike in order to discipline employees adhering to the strike until the very end. The court found on the facts that the employer "was clearly penalizing the strikers for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future." p. 161. The Board's order was enforced.

In *N.L.R.B. v. California Date Growers Association*, 259 F. 2d 587, C. A. 9, the court held that there was substantial evidence in the record as a whole to support the Board's finding that the employer "revised its seniority list, * * * not to implement its assurances to the nonstrikers but rather for the purpose of punishing employees who struck against it, and to discourage by this means further activity by those strikers or other

employees in behalf of the Union." See also *Ballas Egg Products, Inc. v. N.L.R.B.*, 283 F. 2d 871, C. A. 6. *N.L.R.B. v. Lewin-Mathis Co.*, 285 F. 2d 329, C. A. 7, is another case involving superseniority granted to replacements as against strikers in an economic strike. *In this case, the replacements were taken from a non-striking unit of the employer's plant.* At their request, they were granted superseniority against returning strikers, as a condition to accepting the employment. The court found that the strikers were economic strikers and that in such case it was lawful to grant superseniority to replacements. This is in accord with the rule announced in *N.L.R.B. v. Mackay Radio and Telegraph Co.*, 304 U. S. 333, at 345, 346.

From a review of these cases involving superseniority, we find that the question of violation of section 8(a)(1) and (3) of the Act, by reason of granting such superseniority, is a question of fact. Each case must be decided on its own particular facts.

Section 8(a)(3) of the Act, so far as it is pertinent to this case, provides, in part, "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." If this section is violated, it follows that (a)(1) is also violated. This section makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (157, Title 29 U.S.C.) of this title." Section 7 gives employees the right "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In the case of an economic strike there is no restraint on the employer communicating with the employees. This is protected by the first Amendment to the Constitu-

tution. *N.L.R.B. v. Virginia Electric and Power Co.*, 314 U. S. 469; *N.L.R.B. v. Bradley Washfountain Co.*, 192 F. 2d 144, 153, C. A. 7.

In the Bradley case, the court said: "The mandate of the statute is that the employer shall not interfere with or coerce the employees in the exercise of their right to organize and bargain collectively. However, *absent a showing of interference or coercion, or a threat of reprisal or promise of benefit*, in such situations, the employer is free to say to his employees that he wishes to carry on production and, that, if the employees desire so to do, they may return to work.

"* * * In situations such as the one before us, we think the employer may communicate directly to his striking employees the working conditions he is willing to extend to them; and that, if in the exercise of free choice, the employees return to work, no charge of misconduct may properly be levied against him. *If the communications are fair in their description of the situation and they do not offer the returning employees greater benefits than will be extended to those remaining on strike, they do not support a finding of unfair labor practices.*" (Emphasis added.) See also *N.L.R.B. v. Wooster Division of Borg-Warner Corporation*, 236 F. 2d 898, 905, C. A. 6, affirmed in part and reversed in part, 356 U. S. 342.

In the case at bar, the employer offered the first employees at Bucyrus who voluntarily crossed the picket line superseniority over the employees who remained on strike. It instructed them to carry this word and offer to other employees and it sent supervisors out on the picket line to offer the same inducement to the strikers.

The employer made the same offer to employees at Carey, when it was ready to open that plant. It did this by letter on two separate occasions.

The granting of superseniority to employees who gave up the strike and returned to work was a benefit to them which was not granted to those who remained on strike. It constituted an inducement to give up the strike and a threat of reprisal to those who continued on strike. It was not an easy choice to make—an immediate benefit as against a possible future benefit, if the strike succeeded. To a factory worker, seniority against being laid off, when a reduction in force is necessary, is a very valuable right. The importance of seniority as a tool in the hands of the employer is discussed in the *Eric Resistor* case, *supra*.

Although it is conceded that an employer has a right to keep his plant in operation during an economic strike, an honest motive alone for that purpose is not enough. In *Radio Officers' Union of Commercial Telegraphers Union v. N.L.R.B.*, 347 U. S. 17, 45, the court said: "Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement."

We conclude that, under the facts of this case, the conduct of the petitioner in urging the strikers to come back to work on the promise of granting those who abandoned the strike and returned to work seniority over those who remained on strike constituted discrimination which did, in fact, discourage membership in the union. Such discrimination interfered with the employees' right to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

Consequently, we find that the petitioner violated sections 8(a)(1) and (3) of the Act and an order of enforcement is decreed.

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IN THE

Supreme Court of the United States

NO. 288 OCTOBER TERM, 1962

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ERIE RESISTOR CORPORATION and
INTERNATIONAL UNION OF ELECTRICAL, RADIO
AND MACHINE WORKERS, LOCAL 613, AFL-CIO

BRIEF OF ERIE RESISTOR CORPORATION OPPOSING THE PETITION FOR A WRIT OF CERTIORARI

JOHN C. BANE, JR.
JOHN G. WAYMAN
REED SMITH SHAW & McCRAY
747 Union Trust Building
Pittsburgh, Pennsylvania
Counsel for Erie Resistor
Corporation

Of Counsel:

IRVING OLDS MURPHY
GIFFORD, GRAHAM, MACDONALD & ILLIG
615 Masonic Building
Erie, Pennsylvania

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NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

ERIE RESISTOR CORPORATION and INTER-
NATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS,
LOCAL 613, AFL-CIO

**BRIEF OF ERIE RESISTOR CORPORATION
OPPOSING THE PETITION FOR A
WRIT OF CERTIORARI**

**COUNTER-STATEMENT OF QUESTION
PRESENTED**

Is every grant of additional seniority to employees
replacing economic strikers *per se* unlawful?

COUNTER-STATEMENT OF THE CASE

Erie Resistor Corporation is a relatively small company having its principal office in Erie, Pennsylvania, where it also has a manufacturing plant. (R. 68a). It was engaged in the highly competitive business of manufacturing electronic components and molded plastic parts. Competition, including Japanese imports, was so severe that the Company could not interrupt deliveries

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without severe and permanent loss of its markets. (R. 38a-39a, 419a-422a, 425a, 427a-429a, 449-451a).

The Company had dealt amicably with the International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO, for many years, and entered into numerous written labor agreements with that Union. (R. 58a-59a, 71a-73a).

In January, 1959 at the Union's request, the Company entered into negotiations for a new contract to replace the one due to expire March 31, 1959. (R. 73a). Some twenty-one negotiating meetings were held up to March 31, 1959, and many issues were resolved, but not all of them. (R. 37a-39a, 74a-76a, 291a-296a, 233a-235a).

On March 31, 1959 the Union went on strike in support of its demands, which then included a general wage increase, limitation on subcontracting, freezing seniority for certain job incumbents, improved vacations, and assumption by the Company of certain group insurance costs. The strike was conceded to be an economic strike. (R. 3a, 37a-38a, 297a-308a, 278a-279a, 82a-84a).

On March 31, there were about 478 bargaining unit employees at work. There were about 450 bargaining unit employees on layoff. The laid off employees had seniority, but due to the depressed state of the business they had no prospect of being recalled to work. (R. 36a, 69a-70a).

The Company operated the plant throughout the strike because it had to in order to survive. (R. 38a-39a, 419a-422a, 425a, 427a-429a, 449a-451a).

All during April the Company tried to operate using salaried personnel, clerks, engineers, managers and all other non-bargaining unit personnel. Production

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amounted to only 15% to 30% of that required to continue in existence. (R. 4a, 39a, 429a-430a, 409a-410a, 417a).

The biggest electronic component customer cancelled all its orders, the biggest plastics customer removed all its dies and tools, and intense pressure was put on the Company by its remaining customers to resume normal deliveries. (R. 425a, 450a-451a).

Beginning April 2 the Union engaged in mass picketing and violence in an attempt to keep everyone out of the plant. This continued throughout the strike in spite of a state court injunction and ultimately resulted in conviction of the local Union president for contempt. (R. 453a, 370a-372a, 470a, 485a).

By May 3 the Company concluded it would have to hire replacements for the strikers in order to survive. By a letter dated May 3 it notified all employees of its intent to hire permanent replacements beginning May 7. (R. 4a, 39a-40a, 431a-432a, 560a-561a, 320a).

On May 7 and 8 the Union engaged in mass picketing and violence so extensive that on one day the police closed the plant and no one could get in. These riots received prominent headlines in the only newspaper in Erie. (R. 40a, 364a-365a, 453a).

On May 11 the Company began to hire replacements. When they were hired they were told they would not be laid off or discharged at the end of the strike. This assurance was repeated when they actually came on the job. Nevertheless, many who were hired failed to report for work. (R. 4a, 40a-41a, 369a-397a, 366a,

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146a-147a, 227a, 416a, 574a, 576a, 435a, 443a-444a, 343a-344a).

Beginning with the hiring of the first replacement on May 11, the Company, which had never ceased to meet in an attempt to settle the issues in dispute, placed on the bargaining table the problem posed by hiring of permanent replacements in the peculiar circumstances of this case.

On May 11, the day the first replacement was hired, the Company told the Union that in view of the layoff list of some 450 that already existed on March 31, when the strike began, some method would have to be worked out to enable the Company to keep its promise to the replacements that they would not lose their jobs after the strike ended. Since the Company was offering a contract with seniority, the Company suggested some form of seniority arrangement for replacements, but always offered to consider any solution to which the Union would agree. (R. 4a, 311a-312a, 226a-227a, 441a-443a, 435a, 146a-147a, 120a).

The Union, however, absolutely refused to bargain on the subject, taking the adamant stand that all replacements must be discharged and all strikers rehired, including five who had been discharged for violence and misconduct on the picket line. The Union maintained this position throughout the strike, up to and including the last day. (R. 311a-314a, 179a-180a, 222a-224a).

The Company did not announce on May 28 that its proposition to add 20 years to the seniority of replacements would go into effect. This was only one of the many proposals made to the Union in an effort to solve

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the problem. (R. 41a, 343a-345a, 119a-122a, 433a, 435a, 452a-456a).

It was only after many more bargaining meetings, in which the Union adamantly refused to consider any arrangement that would allow the replacements to continue to work after the strike, that the Company, on June 19, publicly announced the reasons and need¹ for a job assurance plan, and on June 15 posted a bulletin announcing it was thenceforth in effect. (R. 6a, 42a, 556a-559a, 566a, 122a-124a, 436a, 452a).

After the Union broadcast the Company proposal of May 28, more replacements came to work, and the number steadily increased from then on, until by June 22 or 23 there were about 450 employees working in the plant, which was virtually a full complement. Of course, of these some 140 were clerks, managers, engineers and the like, and 58 were college students who were hired as temporary replacements during the summer vacation that began around June 1. (R. 522a).

On June 24 the Union sent the Company a telegram announcing that the strike was over, and after some brief misunderstanding, the strike ended on June 25, although no contract was signed at that time. (R. 7a, 43a, 567a, 569a, 166a, 214a-215a).

The 140 supervisors, clerks and engineers returned to their regular duties. The 58 college students were dismissed as promptly as strikers could be called in. All

1. However, the Union without authorization and presumably for its own purposes had widely publicized the so-called "20-year proposal" on radio and television on May 30 and 31. (R. 6a, 41a, 173a).

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the permanent replacements continued to work, and all non-replaced strikers for whom there were jobs were called in, according to seniority, with certain minor agreed-upon exceptions." (R. 7a, 409a-410a, 411a-414a).

On July 17 the Company and the Union signed a new labor contract, and simultaneously executed a "strike settlement agreement." The strike settlement agreement settled the dispute as to the five employees who had been discharged for violence on the picket lines, leaving three discharged and reinstating two with a 30-day disciplinary layoff; provided that non-replaced strikers who were not yet called back would be considered as "bidders" for open jobs; and provided that the Company's replacement and job assurance policy—the so-called "superseniority"—would be resolved by the National Labor Relations Board and the courts, and that it was to remain in effect pending final disposition of the matter. (R. 7a-8a, 44a, 166a, 168a-169a, 578a).

Thereafter, plant operations increased to a high point of 442 bargaining unit employees in September, but then due to economic circumstances declined until there were only 240 in May, 1960. (R. 7a, 523a).

Beginning in October, numbers of employees were laid off, including some returned strikers and some replacements who had been granted the so-called "superseniority." (R. 7a, 280a-282a).

The Trial Examiner found the Company had a lawful economic purpose and need for its actions, and that there was no refusal to bargain in good faith or any evidence of discriminatory motive or attitude, recommending dismissal of the complaint. (R. 33a-64a).

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However, the Board on July 31, 1961, held that notwithstanding the absence of any discriminatory motive or intent or the existence of lawful purpose and need, any so-called superseniority for replacements was *per se* unlawful, and that the strike was converted from an economic strike to an unfair labor practice strike on May 29, when the Union had a meeting concerning the Company's proposal. (R. 3a-28a).

The Board refused to consider the evidence offered by the employer as to the circumstances and need for what was done, and made no findings of fact on these points.² (R. 19a, n. 29).

Upon appeal, the United States Court of Appeals for the Third Circuit refused enforcement on the basis of the narrow question presented by the Board's decision, saying that preferential seniority is not *per se* unlawful, but that the Board is obliged to consider the record as a whole in determining whether there was a violation of Section 8(a) (3).³ (Appendix A to Petition for Writ of Certiorari).

2. Under the circumstances, the only official findings before the Court are those of the Trial Examiner. His findings are part of the record and should not be ignored. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474; 95 L.Ed. 456 (1951); Cf. *N.L.R.B. v. James Thompson & Co.*, 208 F. 2d 743 (2nd Cir., 1953).

3. The alleged violation of Section 8(a)(3) was the only question before the Court. The Board had dismissed the minor, subsidiary 8(a)(5) refusal to bargain charges (R. 20a), and no independent violation of Section 8(a)(1) was alleged. (R. 81a-82a).

*Argument.***ARGUMENT****1. The Alleged Conflict Among the Courts of Appeal Does Not Exist.**

At the time the Court of Appeals rendered its decision in this case the question of so-called "superiority" for replacements had been before four different Courts of Appeal on five different occasions, and on each occasion the Courts held that the controlling question was whether superseniority for replacements was impelled by anti-union considerations or, on the other hand, by the employer's own legitimate economic interests.

The Ninth Circuit Court on two separate occasions rejected the *per se* theory.⁴ *N.L.R.B. v. Potlatch Forests*, 189 F. 2d 82 (1951)⁵; *N.L.R.B. v. California Date Growers Ass'n*, 259 F. 2d 587 (1958).

The Fourth Circuit Court, in *Olin Mathieson Chemical Corporation v. N.L.R.B.*, 232 F. 2d 158 (1956), said:

"* * * With a strike in progress, the primary concern of the employer is to keep his plant in operation. It is then proper for an employer, who might be unable to produce replacements save upon a promise of permanent tenure to promise such tenure to the replacements."

4. Cf. *Pittsburgh DesMoines Steel Co. v. N.L.R.B.*, 284 F. 2d 74 (9th Cir., 1960), which involved rejection of the *per se* theory in the case of a bonus payment said to discriminate between strikers and non-strikers.

5. An excellent and unbiased discussion will be found in the article "*Potlatch Forests, Inc.*," 100 University of Pennsylvania Law Review 287 (1951).

Argument.

In that case, as the Board notes in footnote 13, page 10, of its Petition for Certiorari, the Court granted certiorari on the theory that there was a conflict with *Potlatch*, but it subsequently appeared that, as we have indicated, *Olin Mathieson* did not rest upon the *per se* doctrine, and that the two decisions were completely consistent. The decision of the Fourth Circuit Court accordingly was affirmed *per curiam* without opinion. 352 U.S. 1020.

In 1960 the Court of Appeals for the Sixth Circuit in a so-called superseniority case, *Ballas Egg Products v. N.L.R.B.*, 283 F. 2d 871, followed the rule of the prior decisions, saying:

*** the petitioner's motivation in adopting, maintaining and utilizing its superseniority policy was impelled by anti-union considerations rather than by any economic interest of its own; ***

In December, 1960 the Seventh Circuit Court⁶ in *N.L.R.B. v. Lewin-Mathes*, 285 F. 2d 329, said:

"Having found that the strikers were not unfair labor practice strikers it would necessarily follow that the strikers were economic strikers in which case it would be lawful and proper to grant superseniority to replacements and we so hold." (Emphasis Supplied)

This remarkable unanimity of opinion on the part of fifteen able judges of other Courts of Appeal, now joined by three able judges of the Third Circuit Court,

6. Cf. *N.L.R.B. v. Community Shops, Inc.*, 301 F. 2d 263 (7th Cir., 1962).

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should dispel any idea that there is a conflict among the Circuit Courts.

The Board's sole reliance for this asserted conflict is the decision of the Sixth Circuit Court in *Swarco, Inc., v. N.L.R.B.*, No. 14753, decided May 23, 1962. (Set forth in Appendix D, pp. 31-40, to the Board's petition).

An examination of that decision must disclose that the asserted conflict does not exist.

Perhaps the most obvious factual difference is that in *Swarco* the employer could not argue that its need or purpose was to get or keep replacements, since it did not grant preferential or additional seniority to replacements, whereas that was the prime issue in the *Erie* case.⁷

In this case all the evidence and the facts as found by the Trial Examiner show that Erie's sole purpose in granting additional seniority was to keep its lawful promise to the replacements; that it had to hire replacements to survive; and that it could not get replacements without effectively assuring them permanent jobs. None of these essential facts are present in *Swarco*.

The Sixth Circuit also points out that its decision is not in conflict with *Potlatch, Olin Mathieson, California Date Growers, Lewin-Mathes*, or *Ballas Egg Products*. On the contrary, as it had implied in *Ballas Egg Products*, the Sixth Circuit, this time specifically, recognized that

7. Erie also granted the same additional seniority to Union members who came to work, but this was necessary to avoid disparate treatment of Union and non-union employees.

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"superseniority" is not *per se* unlawful. In discussing *Lewin-Mathes*, the Court says:

"The court found that the strikers were economic strikers and that in such case it was lawful to grant superseniority to replacements. This is in accord with the rule announced in *N.L.B.R. v. Mackay Radio and Telegraph Co.*, 304 U.S. 333, at 345, 346." (Emphasis Supplied)

The implication here is that superseniority may be granted replacements regardless of need or motive, which goes far beyond the narrowly limited ruling of the Third Circuit in the instant case, but it is clearly not inconsistent with it.

In the *Swarco* case, after differentiating the facts in the case before it from those in the other cases involving superseniority, the Sixth Circuit goes on to say:

"From a review of these cases involving superseniority, we find that the question of violation of section 8(a)(1) and (3) of the Act, by reason of granting such superseniority, is a question of fact. *Each case must be decided on its own particular facts.*" (Emphasis Supplied)

Then, in its conclusion, the Sixth Circuit says:

"We conclude that, under the facts of this case, the conduct of the petitioner in urging the strikers to come back to work on the promise of granting those who abandoned the strike and returned to work seniority over those who remained on strike constituted discrimination which did, in fact, discourage membership in the union. * * * " (Emphasis Supplied)

Argument.

Again, this is entirely consistent with the conclusion of the Third Circuit in the instant case.

The Board's difficulty in the instant case, as noted by the Third Circuit, is that it refused to consider any of the facts adduced on the record, but instead relied entirely upon the *per se* theory.

Swarco represents no more than an application by the Sixth Circuit of the rules announced so many times before in the Ninth, Fourth, Seventh and its own Circuit decisions. It does not in any sense constitute adoption of the *per se* theory without regard to the facts, which is the sole point urged by the Board in the instant case.

2. No Novel or Important Question Is Raised by the Decision of the Court of Appeals.

The decision of the Third Circuit Court is carefully considered and written to dispose of the single narrow question before the Court.

It does no more than say that the Board must take into consideration the evidence on the record, and that the Board cannot, by a naked sweeping pronouncement hold that every grant of additional seniority is *per se* unlawful.

8. In this connection it may be of interest to note that superseniority for union officials, granted by Erie Resistor to this Union in this case (R. 169a, 194a, 317a-318a), is not considered extreme or unlawful. Such superseniority was sanctioned by the Supreme Court. *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U.S. 521; 93 L.Ed. 1513 (1949). And "superseniority" or preferential seniority agreed to by an employer and a

Argument.

There is not the slightest conflict with the decision in *Radio Officers v. Labor Board*, 347 U.S. 17; 98 L.Ed. 455 (1954). On the contrary, as Circuit Judge Smith points out in footnote 6:

"We recognize, as did the Supreme Court in the cited case and in other cases, the right of the Board to draw an inference of unlawful motive in the absence of evidentiary facts to support an inference to the contrary."

(Appendix A to Petition for Certiorari, page 24).

The Court of Appeals did no more than follow the instruction, found in the concurring opinion of Justices Frankfurter, Burton and Minton in *Radio Officers*, in which Mr. Justice Frankfurter said:

"In sum, any inference that may be drawn from the employer's alleged discriminatory acts is just one element of evidence which may or may not be sufficient, without more, to show a violation. But that should not obscure the fact that *this inference may be bolstered or rebutted by other evidence which may be adduced, and which the Board must take into consideration.*" (Emphasis Supplied)

union in another context has been held valid. *N.L.R.B. v. Wheland Co.*, 271 F. 2d 122 (6th Cir., 1959).

As recently as July 20, 1962 the Board in *Redwing Carriers, Inc.*, 137 N.L.R.B. No. 162, found that an employer discharged employees engaged in a protected strike, but dismissed the complaint because, as it said, the respondents " * * * did so entirely for the purpose of continuing their business operations." Thus, even the Board does not adhere to the doctrine that any foreseeable interference with protected activities is *per se* unlawful without regard to motive, need or reason.

Argument.

The Supreme Court on many occasions has rejected the *per se* or "irrebuttable presumption of guilt" theory: *Teamsters Union, Local 357 v. N.L.R.B.*, 365 U.S. 667; 6 L.Ed. 2d 11 (1961); *Insurance Agents International Union v. N.L.R.B.*, 361 U.S. 477; 4 L.Ed. 2d 454 (1960).

The Board persistently and erroneously represents the ruling in the instant case as a warrant to employers to grant superseniority in every situation. No one can read the decision of the Court of Appeals and retain that impression.

The Court of Appeals simply adopted the rules established by all the other Circuits that so narrowly delimit any grant of superseniority as to render its use impossible except in unique and pressing circumstances, such as those presented in the instant case. Under the decision, the employer must still come forward with evidence, not simply protestations, of the economic need and justification for his actions, and present facts upon which the conclusion of lawful economic need and purpose can be based. Cf. *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105; 100 L.Ed. 731 (1956).

What the Board seeks is a rule that makes it unnecessary for it to consider any defenses or any evidence aside from the bare fact that additional seniority was granted.⁹ That privilege was properly withheld by the Court of Appeals.

9. Even a man accused of murder is allowed to show that he acted in self defense. Permitting no defense would be a new concept in administration of Section 8(a)(3). As Archibald Cox said in his article "The

Argument.

Archibald Cox wraps up the whole idea colorfully and succinctly in "The Duty to Bargain in Good Faith," 71 Harvard Law Review, 1401, 1437, saying:

"To say 'there ought to be a law against it' does not demonstrate the propriety of the N.L.R.B.'s imposing the prohibition."

The decision of the Court of Appeals makes no new law, presents no new problems, and poses no question not answered a dozen times over by the Supreme Court and the Courts of Appeal with remarkable uniformity.

"Labor Management Relations Act," 61 Harvard Law Review 1, 20:

"The principles to be followed in the administration of Section 8(3) has never been in dispute. * * * 'The true purpose (of the employer) is the subject of investigation with full opportunity to show the facts.' " (Quoting from *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1; 81 L.Ed. 893 (1937)).

*Conclusion.***CONCLUSION**

The petition for certiorari states no reason which could justify a review by this Court of the decision of the Court of Appeals. The petition should, therefore, be dismissed.

Respectfully submitted,

JOHN C. BANE, JR.

JOHN G. WAYMAN

REED SMITH SHAW & McCCLAY

747 Union Trust Building

Pittsburgh, Pennsylvania

Counsel for Erie Resistor
Corporation

Of Counsel:

IRVING OLDS MURPHY

GIFFORD, GRAHAM, MACDONALD & ILLIG

615 Masonic Building

Erie, Pennsylvania

Dated: August 28, 1962.

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AFL-CIO

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM OF RESPONDENT UNION

BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
WINN I. NEWMAN,
Attorneys for
International Union of Electrical,
Radio and Machine Workers,
Local 613, AFL-CIO.
1126 16th St., N.W.,
Washington 6, D.C.

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MEMORANDUM OF RESPONDENT UNION

Respondent, International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO, hereinafter referred to as the Union, was Charging Party before the National Labor Relations Board and Intervenor in the Board's enforcement proceeding in the Court below.

The Union fully agrees with the Board that the Petition for Certiorari should be granted for all the reasons set forth in the Board's petition as well as the reasons which follow.

The question presented in the Board's Petition is one of fundamental importance both to the administration of the National Labor Relations Act and to the exercise of the right to strike guaranteed therein.

As the Board found in its unanimous decision below, a grant of superseniority to nonstrikers subjects strikers to fears and coercive pressures far beyond those raised by permanent replacement of strikers. (R. 10a-16a). Unlike replacement, it affects the future employment tenure of all strikers and not merely those who are replaced. It offers junior strikers a rare opportunity of incalculable value to gain years of seniority over and above their fellow striking employees by abandoning their concerted activity. It threatens debasement of actual seniority to those of long service if they fail to abandon the strike.

The combination of threat and promise, if lawful, would materially alter the practical significance of the right to strike guaranteed by Section 13 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in every case in which a strike occurs or is a possibility. For imposition of superseniority would then loom as a possible counteraction to any strike which succeeds in exerting economic pressure, and the possibility of its institution would play a major role in the exercise of the right to strike.

Moreover, the Court's interpretation of Section 8 (a)(3) of the National Labor Relations Act has impact far beyond its application to superseniority. It raises grave questions as to the application of that Section whenever acts which are inherently discriminatory are taken in the name of an economic motive.

Conclusion

For the reasons set forth above and in the Board's Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

BENJAMIN C. SIGAL,

DAVID S. DAVIDSON,

WINN I. NEWMAN,

Attorneys for

International Union of Electrical,

Radio and Machine Workers,

Local 613, AFL-CIO,

August 29, 1962.

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BENJAMIN C. SIGAL,

DAVID S. DAVIDSON,

WINN I. NEWMAN,

Attorneys for

*International Union of Electrical,
Radio and Machine Workers,
Local 613, AFL-CIO.*

1126 16th St., N.W.,
Washington 6, D. C.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 288

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

ERIE RESISTOR CORPORATION,

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE
WORKERS, LOCAL 613, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT UNION

OPINIONS BELOW

The opinion of the court below (R. 14-21) is reported at 303 F. 2d 359. The Decision and Order of the Board (R. 3a-32a) are reported at 132 NLRB 621.

STATUTES INVOLVED

This case is governed by the National Labor Relations Act, as amended, sometimes referred to herein as the Act,

Act of June 23, 1947, c. 120, 61 Stat. 136-162, as amended Sept. 14, 1959, Pub. L. 86-257, 73 Stat. 525, 542, 545, 29 U.S.C. § 151, et seq. The pertinent provisions are set forth in Appendix A, *infra*.

QUESTION PRESENTED

Does the grant and implementation of preferential seniority status for purposes of layoff and recall to certain employees based solely on the fact that they reported to work during a lawful strike violate Section 8(a)(1) and (3) of the National Labor Relations Act?

The Respondent Union contends that this question should be answered in the affirmative.

STATEMENT OF THE CASE

I. The Facts

A. The Negotiations and Commencement of the Strike

In February 1959, negotiations commenced between the Company and the Union to settle upon terms for a new agreement to replace the then current agreement which was to expire on March 31, 1959. The parties were unable to reach an agreement by March 31 and the Union struck. (R. 3a, 37a-38a; 231a-235a).

As of the start of the strike, the Company actively employed a total of 636 employees, of whom 478 were in the bargaining unit represented by the Union. An additional number of employees were on layoff, of whom approximately 50 had reasonable expectation of recall. All bargaining unit employees joined in the strike at its start. (R. 4a, 36a; 69a). Within a week or two after the start of the strike, without solicitation on the part of the Company, a number of applications for employment were received at the plant. Some of these came by mail. Some came from relatives of non-bargaining unit employees who continued to work at

the plant after the strike started. (R. 4a, 45a; 393a-394a). During the first month of the strike, however, the Company made no effort to employ replacements for the striking employees, but operated the plant with 140 clerical and other non-bargaining unit employees who were assigned to production duties. (R. 4a, 38a; 395a).

B. *The Decision to Hire Replacements and Grant Superseniority*

By May 2, 1959, the strike had still not been settled. Members of Company management, its negotiating committee and Company counsel met and decided that the Company would seek to hire replacements for the striking employees. At this meeting, prior to any attempt to employ replacements, there was discussion among the Company representatives with respect to the grant of some sort of superseniority to employees who came to work following the decision to hire replacements. (R. 4a, 39a; 121a, 186a, 431a-433a).

Following this meeting, the Company sent a letter to all striking and laid off employees of Erie Resistor Corporation announcing to them that the Company intended to start obtaining replacements on May 7 and that strikers would retain employment rights only until replaced. (R. 4a, 39a; 94a, 560a).

The first replacements were hired on May 11. The only qualifications required for employment were that women had to be high school graduates and men had to have some kind of work experience and make a personable appearance. (R. 45a; 365a, 392a). Upon acceptance, replacements were informed by Bertone, the Company's assistant industrial relations director, that they would not be laid off as a result of settlement of the strike (R. 4a, 45a; 120a, 416a). After replacements reported to work within the plant, they were

given the same assurance by Respondent's divisional managers (R. 4a, 41a; 435a, 454a).

On May 11, the day the first replacements started to work in the plant, Company negotiators announced to the Union that they would have to grant nonstrikers some sort of superseniority to implement the assurances given them. (R. 4a, 21a, 40a; 120a, 146a-147a, 149a, 152a). The Union negotiators indicated that they could not agree to the grant of additional seniority protection to nonstrikers because it was discriminatory and unlawful (J.A. 311a).

As negotiations continued, the Company continued to insist upon superseniority as something it wanted and had to have. (R. 21a; 120a, 202a-203a, 210a-211a). Although the Company indicated that it would negotiate as to the form superseniority might take, every form it proposed accomplished the same result. Each separated nonstrikers from strikers for purposes of layoff and recall, so that strikers with greater actual service would be laid off before nonstrikers and recalled after nonstrikers in any economic layoffs which might occur after the strike terminated (R. 5a, 41a-42a; 150a, 153a, 155a, 159a-160a, 164a-165a, 248a). Soon after the company injected the superseniority issue, it became the principal issue and obstacle to reaching an agreement and ending the strike (R. 21a; 200a, 202a, 209a, 211a, 356a).

C. The Adoption of the Twenty Year Policy

By the end of the week which began on May 25, 1959, in addition to the 140 employees outside the bargaining unit who were assigned to production work, thirty-nine employees on layoff status had reported for work as replacements, 8 new employees were hired, and 5 strikers had abandoned the strike and returned to work (R. 5a, 394a-345a, 522a).

On May 28, at the bargaining session with the Union, the Company informed the Union that it had settled upon a particular form of superseniority. It decided to give nonstrikers 20 years additional seniority for purposes of lay-off and recall. The additional seniority was to apply to all employees newly hired during the strike as replacements, to strikers who either returned to their own jobs or returned to replace other strikers before the end of the strike, and to employees who had been on layoff when the strike started and came to work as replacements during the strike (R. 5a, 120a, 211a, 565a). The additional seniority did not apply to other employee benefits based on length of service with the Employer (J.A. 6a; 564a).¹ At this meeting Company representatives continued to insist that superseniority was a prerequisite to any strike settlement, but indicated as they did throughout the strike, that the only commitment made to nonstrikers was that they "would not be laid off on the settlement of the strike." (J. A. 209a-210a).

At a Union meeting the following day, May 29, the strikers resolved to continue the strike until the Company ceased its unfair labor practices by making the Union agree to give superseniority to nonstrikers (J.A. 6a; 274a).

On May 30 or 31, the Union mentioned the 20-year superseniority plan during a Union telecast over a local television station (J.A. 6a; 173a). However, the Company made no attempt to publicize its superseniority policy at this time, and, in fact, deemed it "confidential" (R. 6a, 344a). The Company first notified the employees who worked during the strike of the plan by its letter of June 10 (R. 6a, 173a-174a, 556a). The Company did not advertise for employees to come to work as replacements until June 17, 1959 (J.A. 46a; 114a, 555a).

¹ The 20 year plan was formulated in a statement of Company policy dated May 27, 1959 (R. 564a).

As the strike progressed, the Company continued to receive applications from prospective replacements (R. 393a). At the end of the strike the Company had a reservoir of over 300 employment applications on hand which it had not considered (R. 394a). Industrial Relations Director Ferrell stated that the Company "purposely proceeded slowly in its replacement program so as to preserve, if possible, a continuity of employment." (R. 6a, 45a; 173a). Ferrell indicated that the Company could have replaced all its employees if it had so desired (R. 345a).

During the entire period of the strike, the City of Erie was classified by the United States Department of Labor as an F surplus area. This designation indicated the greatest labor surplus classified by the Labor Department, at least 12% unemployed (R. 6a, 46a; 187a-189a, 584a).

During the months of May and June, employees entered the plant in increasing numbers (J.A. 7a, 15a; 368a, 395a, 522a). Employees who had been in layoff status at the start of the strike began to report for work in substantial numbers as soon as the Company started to hire replacements. They were considered as permanent replacements for strikers. The 140 non-bargaining unit employees reported to work throughout the strike and performed production work. During the week beginning June 8, 1959, the Company hired a large number of temporary employees who came to work with the express understanding that their jobs would terminate at the end of the strike. Returning strikers whose jobs had been abolished or had already been taken by other replacements were treated as permanent replacements for other strikers. (R. 37a, 396a, 399a, 522a).

D. *The Termination of the Strike*

On June 24, the Union suggested a formula for settlement of the remaining issues, which left the superseniority issue for resolution by the Board, and an apparent agreement was reached between the negotiators (R. 7a, 43a; 213a-215a). Following the meeting, the Union withdrew its picket line. Although the agreement did not then materialize, the strike nonetheless came to an end (R. 7a, 43a; 215a).

The Company thereupon informed the Union that it considered 129 strikers as permanently replaced, and set forth its policy with respect to the recall of strikers, providing that strikers would be recalled as available jobs became vacant (R. 144a-145a, 547a, 571a). Under provisions of the expired collective bargaining agreement, which were not changed during negotiations, returning strikers could not bump employees who worked during the strike, and strikers were eligible for recall only to available job openings (R. 412a-415a).

Following termination of the strike the 140 non-unit employees who had performed production work during the strike returned to their regular jobs outside the bargaining unit, and the temporary employees were terminated. Those employees who were on layoff at the start of the strike and returned to work as replacements during the strike continued to work with 20 years added to their former seniority for purposes of layoff and recall. Newly hired permanent replacements were also credited with 20 years' additional seniority.

During the weeks which followed, strikers were recalled in increasing numbers. The actual seniority of the recalled strikers ranged down to 15 years in July and subsequently strikers with 13 or 14 years seniority were recalled. (R. 46a-47a; 171a, 176a, 399a-403a, 523a).

On or about July 1, after the Company had informed employees in the plant that they were free to withdraw from union membership, the Union began to receive a number of withdrawals of union membership from those employees who were working in the plant (R. 16a, 47a-48a; 260a, 263a, 437a).

E. The Post-Strike Negotiations and Layoffs

Negotiations continued until July 17, 1959, when an agreement was executed leaving the superseniority issue unresolved and leaving it to the Board and courts for ultimate resolution (R. 7a, 8a, 44a; 578a).

In the period from October 1959 to January 1960, there were a number of economic layoffs of bargaining unit employees. At that time a number of employees who had been strikers were laid off while nonstrikers with less actual service were retained as employees solely by virtue of the 20 years superseniority which the Company granted them for having worked during the strike. (R. 7a, 47a; 176a, 350a, 523-524a).

II. The Decision and Order of the Board

The Board unanimously found that the grant of superseniority to the nonstrikers was a form of discrimination which went far beyond the employer's right to replace economic strikers and was in direct conflict with the express provisions of the Act prohibiting discrimination. (R. 11a-17a). The Board concluded that in view of the consequences to employee tenure which flowed from the grant of superseniority, discouragement of union activity and membership was inevitable. Specific evidence of a discriminatory motivation was therefore not necessary to establish violation of Section 8(a)(3) of the Act. (R. 17a-18a). The Board found that the violation could not be off-

set by the claim that it was necessary to grant superseniority in order for the employer to protect his business interests (R. 18a-19a). Accordingly, the Board found it unnecessary to decide whether it was in fact necessary to offer superseniority to secure replacements in this case or whether the Company had an express discriminatory intent for instituting superseniority (R. 19a, fn. 29). The Board found additionally that the offer of superseniority to strikers to abandon the strike constituted an independent violation of Section 8(a)(1) of the Act, and that the insistence upon superseniority as a condition of reaching an agreement, constituted a violation of Section 8(a)(5) of the Act (R. 19a-20a). The Board also concluded that the unfair labor practices prolonged the strike, thereby converting the economic strike into an unfair labor practice strike from May 29, 1959, on (R. 20a-22a). It issued an appropriate order based on these findings. (R. 23a-28a).²

III. The Decision of the Court of Appeals

The Court of Appeals denied enforcement of the Board's order, concluding that an intent to discourage union membership or activity could not be inferred from the institution and application of the preferential seniority policy if the reason for its institution was to enable the employer to continue its operations during the strike. The court viewed a grant of preferential seniority to nonstrikers to continue an employer's business as a "concomitant right" . . . "inherent in the right of an employer to replace strikers during a strike." (R. 17-21.)

² In the event this Court determines that the adoption of the superseniority policy and the layoffs pursuant to it were unlawful then the subsidiary findings of the Board with respect to the refusal to bargain and the conversion of the strike to an unfair labor practice strike should be reinstated and the entire order of the Board enforced. See *N.L.R.B. v. Wooster Division of Borg Warner*, 356 U.S. 342.

SUMMARY OF ARGUMENT

I. Whenever the Board has been confronted with a grant of preferential seniority favoring all those who reported to work during a strike as opposed to those who adhered to the strike, the Board has found a violation of Section 8(a)(1) and (3).

The proscription of Section 8(a)(3) against discrimination to encourage or discourage union membership applies to two principal groups of cases. In the first group, the question to be resolved is whether in the alteration of some aspect of an employee's hire or tenure of employment the action was based on his union activity or on any other reason unrelated thereto. In such cases specific evidence of an employer's anti-union motivation is usually necessary to resolve this question.

In the second group of cases, the alteration of an aspect of the employment relationship is based directly on some form of union activity. In these cases discrimination occurs which inherently discourages or encourages union membership, and specific evidence of an intent to discourage membership by discrimination becomes unnecessary for a finding that Section 8(a)(3) has been violated. *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 43-45.

In cases which fall in the second group, the fact that an employer acted to protect a business interest, even where substantial economic necessity can be shown, does not preclude a finding that the intent necessary to establish a violation of Section 8(a)(3) is present. *Radio Officers' Union v. N.L.R.B.*, *supra*; *N.L.R.B. v. Gluek Brewery Co.*, 144 F. 2d 847 (C.A. 8); *N.L.R.B. v. Hudson Motor Car Co.*, 127 F. 2d 528 (C.A. 6).

In this case the Court of Appeals failed to observe the distinction between the two principal groups of cases arising under Section 8(a)(3). It is clear from a comparison

of the instant case with the *Gaynor News* case, one of the three cases disposed of in the *Radio Officers* opinion, *supra*, that this case falls in the second group of cases described above. As in *Gaynor*, the discrimination with regard to hire or tenure of employment was based solely on union membership and inherently encouraged or discouraged union membership. The Board therefore properly found unavailing the protest of the employer that it acted for business reasons. 347 U.S., at 45.

That Congress intended such protests to be unavailing was confirmed by the 1947 amendments to the Act adopted by Congress. Congress adopted specific amendments designed to eliminate many of the pressures on employers which gave rise to the economic necessity which had been rejected as defenses by the Board. But Congress did not act to excuse an employer when it succumbed to these or any other pressures and engaged in discrimination.

The decision of this Court in *Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667, affirms the principles set forth in *Radio Officers* and does not alter them. There in the absence of evidence establishing that there was discrimination, this Court concluded that discrimination could not be inferred. Nothing in its holding altered the principle that where discrimination has occurred based solely on union activity, the intent to discourage or encourage union activity is to be inferred.

Wholly apart from the violation of Section 8(a)(3), the Company's formulation and application of its seniority policy independently violated Section 8(a)(1) of the Act. The employees who struck were engaged in protected concerted activity in its most traditional form. The offer of preferential seniority to nonstrikers both promised the nonstrikers preferential treatment if they would refrain from the protected strike activity and threatened those who

continued to engage in the strike with permanent debasement of their job security. Such promises and threats constitute interference with, and restraint and coercion of, employees in the exercise of their protected rights of the most obvious form. Moreover, the implementation of the promises and threats after the strike was over constituted additional interference, restraint and coercion. Specific motivation or purpose to interfere with employees in the exercise of their rights is immaterial if the effect of an employer's conduct is to engage in such interference. *N.L.R.B. v. Illinois Tool Works*, 153 F. 2d 811 (C.A. 7); *N.L.R.B. v. McBride*, 247 F. 2d 124 (C.A. 10). Thus, the Board's consistent view that a grant of preferential seniority to nonstrikers violates Section 8(a)(1) and (3) is correct.

II. In *N.L.R.B. v. Mackay Radio Co.*, 304 U.S. 333, this Court stated that an employer has the right to protect and continue his business by filling vacancies left by strikers and is not bound at the conclusion of the strike to discharge those so hired in order to create vacancies for the returning strikers. In this case, the Court below found that the right to grant preferential seniority to non-strikers was concomitant to the right to replace strikers set forth in *Mackay*. However, preferential seniority, such as that granted nonstrikers in this case is of an entirely different character from the right to replace strikers as set forth in *Mackay* and carries with it vastly different consequences.

The impact of replacement of strikers is complete at the end of the strike. Only the strikers who were replaced are affected. Here the preferential seniority granted non-strikers only commenced to operate after the strike was over and had effect on the strikers who were not replaced and who returned to work after the strike. The result was that months after the strike was over, when layoffs for economic

reasons occurred, the selection of employees for layoff was dictated by the preferential seniority policy, and strikers with greater actual service were laid off in deference to shorter service nonstrikers. The impact of the additional seniority given nonstrikers will continue indefinitely in the future.

The difference between mere replacement and replacement with preferential seniority is not limited to the timing or duration of its impact. During the strike, the threat and inducement posed by superseniority is far more sweeping than that posed by mere replacement. An employee who does not fear replacement must fear, nonetheless, that his seniority rights may be subordinated to newly hired replacements for other employees or by junior employees who choose to cross the picket line. Likewise to a striking employee with relatively short service the inducement is proffered to cross the picket line and thus gain years of seniority over that of his fellow employees which he could never hope to attain under normal circumstances.

MacKay Radio itself draws the line between replacement on the one hand and discrimination in the terms and conditions of reinstatement of strikers on the other. *MacKay* held that the latter is proscribed. The preferential seniority granted in this case discriminated against strikers in the terms and conditions of their reinstatement and is proscribed under *MacKay*.

III. The discrimination inherent in the grant of preferential seniority to nonstrikers in this case cannot be justified unless the right to strike is to be rendered useless. If the employer may discriminate against strikers with regard to the terms and conditions of their employment upon conclusion of the strike in order to avoid the economic pressure which the strike places upon him, then it must follow that the more successful a strike, the less the protection of the right of employees to engage in it. The Act

so construed would provide the right to engage in strikes without fear of discrimination only if they are ineffective.

Contrary to the view of the court below, in the relatively few cases in which business reasons have been found to justify discriminatory conduct which inherently encouraged or discouraged union activity, the basis of the decision was that there had been a collision of employee rights with employer rights which required a balance to be struck. *N.L.R.B. v. Truck Drivers Union No. 449*, 353 U.S. 87, 96. The decision in *Mackay Radio* is itself an example of a case in which such rights collided and were balanced. In each case where conflicting rights must be balanced, it is the function of the Board to strike that balance and its discretion is subject only to limited judicial review. Here the attack on employee rights is so fundamental and the rights attacked so clearly intended to be protected by the Act, that the Board was well within the limits of its discretion in refusing to subordinate employee rights. Indeed, to have done so would have altered the Act and warranted reversal. Accordingly, the unanimous decision of the Board below was correct, and its order should be enforced.

ARGUMENT

I. The Grant of Superseniority to Nonstrikers Discriminated Against Strikers and Interfered With Protected Activity in Violation of the Act.

A. *The Grant of Superseniority to Nonstrikers is Discrimination Which Inherently Discourages Union Membership in Violation of Section 8(a)(3) of the Act.*

Whenever the Board has been confronted with the separation of employees into two groups for seniority purposes, favoring all those who reported to work during a strike as opposed to all those who adhered to the strike,

the Board has found that separation unlawful. *Paper, Calmenson & Co.*, 26 NLRB 553, 557; *Precision Castings Co.*, 48 NLRB 870; *General Electric Co.*, 80 NLRB 510; *Potlatch Forests, Inc.*, 87 NLRB 1193, enforcement den. 189 F. 2d 82 (C.A. 9); *Olin Mathieson Chemical Corp.*, 114 NLRB 486, enf'd. 232 F. 2d 158 (C.A. 4), aff'd. 352 U. S. 1020; *California Date Growers Assn.*, 118 NLRB 246, enf'd. 259 F. 2d 587 (C.A. 9); *Ballas Egg Products*, 125 NLRB 342, enf'd. 283 F. 2d 871 (C.A. 6); *Swan Rubber Company*, 133 NLRB No. 31 enforced sub nom *N.L.R.B. v. Swarco*, 303 F. 2d 668 (C.A. 6), petition for certiorari pending; *Griffin Wheel Co.*, 136 NLRB No. 144. The underlying principle is succinctly stated in the *General Electric* case: "[E]xcept to the extent that a striker may be replaced during an economic strike, his employment relationship cannot otherwise be severed or impaired because of his strike activity." 80 NLRB, at 513. See also *N.L.R.B. v. J. Mitchko, Inc.*, 284 F. 2d 573, 576 (C.A. 3); *N.L.R.B. v. Industrial Cotton Mills*, 208 F. 2d 87, 91 (C.A. 4), cert. den. 347 U.S. 935.

Only the Ninth Circuit Court of Appeals and the court below have found lawful the distinction between groups of employees for seniority purposes on the basis of their strike activity. *N.L.R.B. v. Potlatch Forests, Inc.*, 189 F. 2d 82.³

Section 8(a)(3) makes it an unfair labor practice "by discrimination in regard to hire or tenure of employment

³ While there is some additional judicial expression of support for this view in *N.L.R.B. v. Lewin-Mathes Co.*, 285 F. 2d 329 (C.A. 7), the issue was not before the court and had not been raised by the complaint. See also *N.L.R.B. v. California Date Growers, Inc.*, 259 F. 2d 587, in which the Ninth Circuit reiterated its *Potlatch Forests* views, but affirmed the Board's finding that the grant of superseniority in that case was unlawful. The Ninth Circuit *Potlatch* decision was the subject of critical comment in a number of law review notes. See e.g. 27 U. Chi. L. Rev. 368 (1960); 6 Duke B. J. 143 (1957); 42 Va. L. Rev. 836 (1956); 30 Texas L. Rev. 776 (1952); 6 Rutgers L. Rev. 470 (1952); 9 Wash. & Lee L. Rev. 115 (1952); 4 Stan. L. Rev. 151 (1951).

or any term or condition of employment to encourage or discourage membership in any labor organization."

As this Court recognized in its opinion in *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, there are two principal groups of cases in which the application of Section 8(a)(3) comes into question. In the first and larger group fall those cases in which the question to be resolved is whether an act of discrimination was caused by union activity or was for any other reason. Typical of such cases are those in which it is charged that an employee was discharged for his union organizational activities and it is urged in defense that the discharge was unrelated to union activity but caused by faulty work performance, breach of plant disciplinary rules, an economic layoff or similar reasons. In these cases evidence of an employer's motive in taking action alleged to violate Section 8(a)(3) is usually essential to resolve that question, 347 U.S. at 43-44.

In the second group of cases the sole basis of discrimination between employees is their union activity. In these cases the discrimination inherently encourages or discourages union membership, and specific evidence of intent becomes unnecessary to a finding that Section 8(a)(3) has been violated, and indeed evidence that the employer was motivated by other considerations is "unavailing." 347 U.S. at 44-45. In some cases which fall in the second group, evidence of a desire to protect a business interest may be considered as justification or excuse for the violation of employee rights, but consideration of whether or not the protection of the employer's interests justifies his conduct comes into play only after there has been initial determination that employee rights have been infringed resulting in a collision between employee protected rights and employer rights which must be resolved. *N.L.R.B. v. Truck*

Drivers Local Union No. 449, 353 U.S. 87, 96. (See pp. 31-33, *infra*).

In this case, the Court of Appeals confused the question whether the employer's asserted economic reasons constituted the *basis* of its grant of superseniority with the question whether those reasons *justified* the grant. In so doing, it confused group 1 situations with group 2 situations, and in effect, held that whenever a significant economic purpose is advanced to justify discriminatory conduct, a violation of Section 8(a)(3) cannot be sustained. It thus usurped the function of the Board in assessing such justifications and held that the protection of an employer's economic right must always outweigh the protection of the right of employees to engage in union activity free from interference and free from discrimination based on such activity.

That this case falls in group two rather than group one appears readily from comparison of this case to the *Gaynor News* case, one of the three cases joined for disposition in the *Radio Officers*' opinion, *supra*.

In *Gaynor*, the company was charged with violation of Sections 8(a)(1), (2) and (3) by granting retroactive wage increases and vacation payments to employees who were members of the union and refusing such benefits to other employees because they were nonmembers. The union was recognized as the exclusive bargaining representative under a closed shop agreement, which permitted employment of nonmembers, however, under certain circumstances. The union was closed and nonmember employees were not eligible for membership. The Company made retroactive wage payments to union member employees in compliance with its agreement and in addition adjusted their vacation payments. It made no similar payments to nonmember employees on the ground that it was not contractually bound

to do so and in its business judgment did not choose to do so. The Court concluded that this discrimination, based solely on union membership, inherently encouraged union membership, and that evidence of the discrimination was alone sufficient to establish that Section 8(a)(3) was violated, 347 U.S. at 45. It was conceded "that the employer acted from self-interest and not to encourage unionism," 347 U.S., at 37. Nonetheless, the intent to encourage union membership was "sufficiently established" by the evidence of discrimination based on membership, and the violation was found.

Gaynor is indistinguishable from the instant case. There members were given additional pay and vacation benefits which nonmembers were denied. Here nonstrikers were rewarded with preferential seniority and adherents to the strike lost relative job rights of overwhelming significance. Both constitute clear discrimination, 347 U.S., at 39. There the discrimination was based solely on union membership. Here it was based solely on union activity—adherence to the strike. See 347 U.S., at 39-41.

The Court stated:

"In holding that a natural consequence of discrimination, based solely on union membership or lack thereof, is discouragement or encouragement of membership in such union, the court merely recognized a fact of common experience—that the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action. No more striking example of discrimination so foreseeably causing employee response as to obviate the need for any other proof is apparent than the payment of different wages to union employees doing a job than to non-union employees doing the same job." 347 U.S., at 46.

It is a no less recognizable fact of common experience that the desire of employees to abandon union membership and activity "is directly proportional to the advantages thought to be obtained from such action." Equally striking an example of discrimination "foreseeably causing employee response as to obviate the need for any other proof" is the granting to nonstrikers of job protection against future layoff of a character impossible to attain at any other time or under any other circumstances, in relation to the job protection of one's fellow employees who are on strike. The foreseeability of this response is at its peak in an area of critical unemployment and acute economic depression.

Indeed in this case, as the Board found, the finding of discouragement of union membership need not stand on inference alone (R. 16a). From July 1 to July 17, at the instigation of the Respondent, 173 members withdrew from the Union; most within the first few days after July 1. These withdrawals came at a time immediately after the strike when practically all employees working were non-strikers standing to benefit from the grant of superseniority to them.

In *Gaynor* it was conceded "that the employer acted from self-interest and got to encourage unionism." 347 U.S. 17, 37. Here the Employer protested that it similarly acted from self-interest and without any design to discourage unionism. As in *Gaynor*, that "protestation . . . must be unavailing." 347 U.S. at 45.

B. A Finding That the Act Has Been Violated By Discrimination Based Solely On Union Activity Is Not Inconsistent With A Finding That The Employer's Purpose in Discriminating Was Economic.

Other cases falling in the second group with *Gaynor* confirm that an employer's acts to protect its business interests do not avail to preclude a finding of a violation if they discriminate between employees on the basis of union activity.

Thus, in *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, discharges and suspensions for violation of a rule prohibiting union solicitation were found to violate Section 8(a)(3). As this Court later observed, there "we noted that such employer action was not 'motivated by opposition to the particular union or, we deduce, to unionism,' and that 'there was no union bias or discrimination by the company in enforcing the rule.'" *Radio Officers' Union v. N.L.R.B.*, 347 U.S., at 45. The Court continued:

"But we affirmed the Board's holding that the rules involved were invalid when applied to union solicitation since they interfered with the employees' right to organize. Since the rules were no defense, and the employers intended to discriminate solely on the ground of such protected union activity, it did not matter that they did not intend to discourage membership since such was a foreseeable result." 347 U.S., at 46.

In *N.L.R.B. v. Industrial Cotton Mills*, 208 F. 2d 87 (C.A. 4), at issue was the denial of reinstatement to an employee based on the mistaken belief that he was guilty of strike misconduct. The Court found it is "true that where denial of reinstatement results from the employer's reasonable and sincere mistake, there is no evil intention behind

the harm suffered by the employee." 208 F. 2d, at 91. Nonetheless, it concluded that the necessary intent was present to sustain a finding that the Act was violated.

In *Cusano, d/b/a American Shuffleboard Co. v. N.L.R.B.*, 190 F. 2d 898 (C.A. 3), an employer's mistaken belief that an employee made a false statement about the employer while engaging in protected activities did not preclude a finding that the discharge violated Section 8(a)(3). See also *General Motors Corp. v. N.L.R.B.*, 150 F. 2d 201 (C.A. 3), enf'd, 59 NLRB 1143; *Summit Mining Corp. v. N.L.R.B.*, 260 F. 2d 894, 897, 898 (C.A. 3).

In *Allis-Chalmers Mfg. Co. v. N.L.R.B.*, 162 F. 2d 435 (C.A. 7), the employer reclassified inspectors, after they selected a bargaining representative, in order to retain control of inspection by management. The Court enforced the Board's decision that the reclassification violated Section 8(a)(3), finding it "enough to say that whatever purpose an employer may have in demoting or otherwise adversely affecting the employment status of his employees who engage in lawful union activity, so long as that action would not have been taken in the absence of such union activity, the employer thereby necessarily discourages membership in the labor union organization involved . . ." 162 F. 2d at 440.

Cases which fall in this group are not limited to the case of mistaken belief or to business decisions of relatively minor importance which result in discrimination based solely on union activity. In *N.L.R.B. v. Gluek Brewing Company*, 144 F. 2d 847 (C.A. 8), cited in *Radio Officers* as a case typical of this group, 347 U.S., at 45, n. 53, the discrimination occurred to avoid a boycott and intimidation which threatened the employer with substantial economic loss unless it discriminated against employees because of their union affiliation. There, the court found the dis-

ermination unlawful, even though it was "clear that [the employer] had no purpose—in the sense of animus or desire—to injure one [union] or help the other. Its underlying and compelling purpose was to save itself." 144 F. 2d, at 853.

Similarly, in *N.L.R.B. v. Hudson Motor Car Company*, 128 F. 2d 528 (C.A. 6), the Court affirmed a finding of violation of Section 8(a)(3), when fear of disruption and economic reprisal by a majority union caused the employer to discriminate against minority union adherents. The Court stated:

"We think it right and just to say that so far as the record shows, respondent has not wilfully violated the provisions of the Act, but the intent of the employer is not within the ambit of our power of review. When it is once made to appear from the primary facts that the employer has violated the express provisions of the Act, we may not inquire into his motives." 128 F. 2d, at 553.

To the same effect are *N.L.R.B. v. Star Publishing Company*, 97 F. 2d 465, 471, (C.A. 9); *N.L.R.B. v. Newspaper and Mail Deliverers Union*, 192 F. 2d 654, 656 (C.A. 2); *N.L.R.B. v. Oertel Brewing Co.*, 197 F. 2d 59, 62 (C.A. 6); *N.L.R.B. v. Pappas & Co.*, 203 F. 2d 569, 570.

The very formulation of Section 8(a)(3) is indicative that Congress did not intend to require a specific motive to encourage or discourage union activity in every case. If it had such an intent, it would have been a simple matter for Congress to proscribe discrimination "for the purpose of" encouraging or discouraging union activity.

That Congress intended that the defense of economic motive to discrimination based solely on union activity be

rejected is confirmed by the 1947 amendments to the Act. Thus, Congress adopted specific amendments designed to eliminate many of the pressures on employers which had given rise to the economic necessity raised as defenses in these cases. Sections 8(b)(1)(A) and 8(b)(2) were enacted to eliminate union pressure to cause favoritism to one union over another or to cause discrimination against employees for nonmembership or other union activity. Section 8(b)(4) was enacted to outlaw secondary boycotts, jurisdictional strikes and other pressures upon employers with which they could not cope through collective bargaining. But Congress enacted no legislation to immunize an employer who succumbed to such pressures or to any others to the detriment of the rights of employees because of economic necessity. Congress clearly understood that the employer's motive was unimportant when he was caused unwillingly to encourage or discourage union membership by discrimination in violation of Section 8(b)(2). But discrimination resulting from yielding to such pressure continued to be an unfair labor practice. See e.g. *N.L.R.B. v. Imparato Stevedoring Co.*, 250 F. 2d 297, 302 (C.A. 3); *N.L.R.B. v. Richards*, 265 F. 2d 855 (C.A. 3).

The Congressional intent was to eliminate pressures which if considered unjustifiable, not to erode employee rights by permitting self-help whenever an employer found pressure burdensome.

Nothing in the decision of this Court in *Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667, alters this long line of clear precedent. In the face of an express disclaimer of discrimination against casual employees because of presence or absence of union membership, this Court concluded that a hiring hall agreement could not be found discriminatory *per se*, and discrimination therefore could not be assumed without specific evidence.

In the Board's underlying decision, it had conceded that hiring hall agreements were not *per se* unlawful, but held that in the absence of certain safeguards against their misuse, discrimination could be inferred even in the absence of evidence of motive. 365 U.S., at 671-672. However, as operation of the hiring hall could be based either upon the legitimate grounds which justify the operation of hiring halls or upon considerations relating to union membership or activity,⁴ application of the hiring hall agreement presented a typical group one situation. Therefore, specific evidence of motivation was necessary to establish that there had been discrimination.

Similarly in *Pittsburgh Des Moines Steel Co. v. N.L.R.B.*, 284 F. 2d 74 (C.A. 9), the bonus plan which the Court of Appeals found lawful was capable of application to discriminate against employees because of their union activity, but its terms made its application dependent upon a number of factors, some of which were unrelated to union activity and others of which were only incidentally affected by union activity. Thus, proof of specific anti-union motivation or that no criteria other than the union activities of employees were in fact involved in the application of the plan was necessary. Such proof was lacking.⁵

⁴ It was clear from the legislative history that the operation of a union hiring hall was not itself union activity on the basis of which discrimination is banned 365 U.S., at 672-674. If this were not the case, then all having hiring hall agreements would discriminate against employees on the basis of union activity—i.e., their failure to seek employment through the hiring hall—and discrimination would have been present.

⁵ While the result in *Pittsburgh Des Moines* is consistent with the decision of the Board in this case, we respectfully disagree with the reasoning of the Court that an employer may act to remedy a business condition which is caused by protected activity when the action results in the segregation of employees into two classes based solely upon their participation in union activity. While a strike may justify curtailment of operations due to a loss of business, it cannot justify selection of employees for layoff based on their participation in the strike. See *N.L.R.B. v. Richards*, 265 F. 2d 855, 860 (C.A. 3).

Here, as in *Radio Officers*, discrimination was express in the Company's statement of policy and in the Company's choice of employees for layoff pursuant thereto. As in *Radio Officers*, the foreseeable consequence of this discrimination was discouragement of union membership, and all the elements necessary to establish a violation of Section 8(a)(3) were present.

C. The Grant of Superseniority to Nonstrikers Independently Interferes With Employee Rights in Violation of Section 8(a)(1).

Wholly apart from the violation of Section 8(a)(3) the Company's conduct in formulating and applying its superseniority policy independently violated Section 8(a)(1) of the Act. Section 8(a)(1) proscribes interference with, or restraint or coercion of, employees in the exercise of their Section 7 rights. Section 7 confers upon employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining."

The employees who struck were engaged in traditional protected concerted activity within the meaning of Section 7. The offer of superseniority to nonstrikers combined both a promise to nonstrikers and a threat to those who continued to strike. To those who abandoned the strike, it promised otherwise unattainable seniority protection against future layoff conditioned solely upon their abandonment of the strike. To those who continued to strike, it threatened debasement of earned seniority by the artificial elevation of less senior employees above them for purposes of layoff and recall, solely because they, the strikers, elected to continue to engage in their protected concerted activity. Such promises and threats constitute the most obvious

form of interference, restraint and coercion. *N.L.R.B. v. James Thompson & Co.*, 208 F. 2d 743, at 748 (C.A. 2); *American Rub' Products Corp. v. N.L.R.B.*, 214 F. 2d 47, 54 (C.A. 7); *N.L.R.B. v. Wheeling Pipe Line, Inc.*, 229 F. 2d 391, 392 (C.A. 8); *N.L.R.B. v. Trinity Valley Iron & Steel Co.*, 290 F. 2d 47 (C.A. 5), enforcing 127 NLRB 417; See also *N.L.R.B. v. Spiewack et al.*, 179 F. 2d 695, 696-7 (C.A. 3). The implementation of the promises and threats through enforcement of the policy, thus rewarding non-strikers and penalizing strikers because of their concerted activities, is a further violation of Section 8(a)(1). *N.L.R.B. v. James Thompson & Co.*, 208 F. 2d 743, 748. When viewed as an independent violation of Section 8(a) (1), specific motive or purpose is immaterial if the conduct in question may reasonably be said to tend to interfere with, restrain or coerce employees in the exercise of concerted protected activity. *N.L.R.B. v. James Thompson Co.*, *supra*; *Time-Q-Matic v. N.L.R.B.*, 264 F. 2d 96 (C.A. 7); *N.L.R.B. v. Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7); *N.L.R.B. v. McBride*, 274 F. 2d 124, 126 (C.A. 10).

II. The Right to Grant Superseniority to Nonstrikers Is Not Conferred by the Mackay Radio Decision

The decision of this Court in *N.L.R.B. v. Mackay Radio Co.*, 304 U.S. 333, affirmed a decision of the Board that the discriminatory selection of strikers for replacement violated Section 8(3) of the Wagner Act. In reaching its conclusion the Court noted that it did not follow from Section 13 of the Act "that an employer guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for

them." 304 U.S., at 345-346. The Board had not held to the contrary, and the substance of this observation was not in issue in that case, nor is it in issue here, for even absent the superseniority policy, the employer was not bound to discharge the strike replacements upon termination of the strike to make place for returning strikers.

While the Court added in *Mackay* that "The assurance by respondent to those who accepted employment during the strike that . . . their places might be permanent was not an unfair labor practice," 304 U.S., at 346, nothing in the *Mackay* decision justifies interpretation of the word "permanent" to mean more than assurance that the replacements would not be displaced by returning strikers. This was the only assurance given in the *Mackay* case. The semantic argument that "permanent" as used therein means assurance against any future layoff not only goes beyond what the facts of that case warrant, but beyond the guarantee that an employer could fulfill, for future economic decline might require the layoff of replacements or the cessation of operations. As demonstrated below, such a commitment would also result in substantial infringement of employee rights beyond that which flows from the assurance against displacement by returning strikers. Under these circumstances, it is clear that the interpretation which does least violence to protected rights was intended.⁶

Superseniority, as that term is used in this case, involves more than permanent replacement. Here, a great number

⁶ The semantic argument based on the word "permanent" must fail in this case for the further reason that the Company showed no such understanding of permanence when it assured replacements of their tenure. The assurance which Company representatives repeatedly testified was given to replacements was that they would not be laid off as a result of settlement of the strike. (R. 171a, 172a, 174a, 342a, 343a, 346a, 367a, 416a, 435a, 454a). This is the same assurance of permanence as that in the *Mackay* case.

of strikers were replaced. But the impairment of strikers' rights went beyond replacement. The procedures for lay-off and recall provided for selection of employees for layoff and recall in order of seniority, as is typical in collective bargaining agreements. Following the end of the strike many strikers returned to work whose service with the Company was less than 20 years and as low as 13 years. Several months later for economic reasons, there were layoffs. Because of the twenty years additional seniority given the nonstrikers by the Company, the employees who worked during the strike, some of whom had only several months actual service, and most of whom had less than thirteen years service, were retained in preference to employees who had exercised their right to strike and had as much as twenty years actual service. Thus, not only were replacements not displaced to make room for returning strikers, but long after the replaced strikers had been turned away from the plant, an additional group of strikers was laid off, while nonstrikers were preferred for retention solely on the basis of the additional seniority, or superseniority, given them for having worked during the strike.

Unlike mere replacement, then, superseniority is not limited in its impact to the duration of the strike or to the group of strikers who are replaced. Replacement may affect any individual employee who finds at the end of the strike that he has been replaced, but once the strike is over, replacement poses no further threat to those who have returned to work, and the impact of a replacement program is at its end. On the other hand, superseniority has impact which continues indefinitely into the future. It affects substantially all employees who engage in a strike, whether or not they are replaced on their jobs. When superseniority is granted nonstrikers by an employer, strikers face more than the possibility that they may be permanently replaced

during the strike. Following the termination of the strike their seniority rights earned through years of toil are permanently diluted and subordinated to those of employees who crossed the picket lines during the strike, whose days of strike-breaking work will outweigh years of strikers' service.

The difference between permanent replacement and replacement with superseniority based on abstinence from strike activity makes itself felt during the strike as well. During a strike the grant of superseniority constitutes a threat and an inducement to striking employees far more pervasive than mere permanent replacement. As to senior employees who would normally feel that their long experience would make their replacement unlikely, superseniority raises the threat that junior employees or new hires may, by the mere act of crossing the picket line, make the senior employees subordinate in seniority. As to junior employees, laid off employees, or prospective replacements, the promise of superseniority offers them a once in a lifetime chance to achieve protection against layoffs that they could never hope to achieve in normal circumstances in relation to their fellow senior employees. The specters consisting of both threat and promise, raised by superseniority, constitute a potent divisive force and inducement to abandon the strike and union activity. (See pp. 25-26, *supra*.)

Finally, the application of the *Mackay* decision to superseniority proves too much and is contrary to the holding of *Mackay*. If superseniority for nonstrikers is merely an adjunct of the right to replace strikers sanctioned in *Mackay*, then the grant of superseniority to nonstrikers would be permissible in any economic strike without the need to demonstrate economic necessity for its institution. For the right of an employer to replace permanently any

economic striker does not require a demonstration by an employer that it was necessary for him to give assurances against displacement in order to continue his business. If *Mackay Radio* validates a grant of superseniority to non-strikers, then it must follow that an employer may similarly grant superseniority to nonstrikers in any economic strike without a demonstration of economic necessity. See *N.L.R.B. v. Potlatch Forests, Inc.*, 189 F. 2d, at 86.

The extension of *Mackay* by the Court below, moreover, ignores the very holding of that case. Thus, while the dictum in *Mackay* affirmed the right to replace strikers permanently during a strike, the holding of the case was that the employer in that case had violated the Act by discrimination against strikers because "Any . . . discrimination in putting [unreplaced strikers] back to work is . . . prohibited by Section 8." 304 U.S., at 346. Here, by virtue of the preferential seniority granted nonstrikers, the strikers were discriminated against because of their strike activities when they were put back to work in that their relative seniority was permanently impaired because they adhered to the strike and many ultimately lost employment because of it. Thus, *Mackay* sets forth the very basis for distinguishing permanent replacement from superseniority for nonstrikers—the distinction between conduct which does not discriminate against those who are employees after termination of the strike and that which does.

There is no warrant for reading *Mackay Radio* to alter so drastically its impact, nor is there the slightest indication that Congress intended employee rights to be so impaired. (See pp. 33-34, *infra*.) *Mackay Radio* provides only "that an employer guilty of no act denounced by the statute" may protect and continue his business. The application of *Mackay* to sanction superseniority to non-strikers would permit performance of "an act denounced

by the statute" in the name of protection and continuation of an employer's business.

III. The Board Has Correctly Refused to Find That a Business Purpose Justifies a Grant of Preferential Seniority to Nonstrikers.

The discrimination inherent in a grant of preferential seniority to nonstrikers goes to the very heart of the Act and cannot be justified without hollowing the right to strike and defusing the only economic weapon given employees with which to support their collective bargaining goals. For the consequence of the conclusion of the court below that a business purpose for granting preferential seniority to nonstrikers removes such discrimination from the scope of Section 8(a)(3) is sweeping. In that event, a lawful strike which succeeds in exerting economic pressure on an employer unleashes an employer from observance of the requirements the Act would otherwise impose and sanctions any form of preferential treatment to nonstrikers deemed necessary to bring about easing the pressure generated by the strike through the inducement of strikers and replacements to ignore the strike.

The error of the court below stems from its failure to recognize the basis of the relatively few cases in which the conclusion has been reached that business reasons have justified discriminatory conduct which inherently encouraged or discouraged union membership or activity. This conclusion flowed not from a finding that employee rights were not infringed, but from recognition that there had been a collision of employee rights with employer rights which required a balance to be struck. *N.L.R.B. v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96. As the citation of *Mackay Radio* in that case confirms, *Mackay* is an

example of a case presenting such a collision of rights.⁷ 353 U.S. at 96, fn. 27.

In each case where such conflicting interests are to be balanced,

"The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *N.L.R.B. v. Truck Drivers Local Union No. 449*, 353 U.S., at 96.

In that case this Court, in affirming the balance struck by the Board and reversing the reviewing Court of Appeals, cautioned against "too narrowly confining the exercise of the Board's discretion." 353 U.S. at 97.

Where the balance has been struck in favor of employer interests, apart from *Mackay*, typically the conflicts have concerned the right to engage in a defensive lockout in response to strike activity or to strike an accommodation between organizational rights and an employer's rights to maintain discipline and order. See e.g. *N.L.R.B. v. Truck Drivers Local Union No. 449, supra*; *N.L.R.B. v. Babecock &*

⁷ The Court below read *Mackay* to mean that the existence of a business reason negated the conclusion of proscribed discrimination which flowed from the acts of discrimination based solely on union activity. (R. 21). Thus, by overlooking the fact that *Mackay* resulted from a balancing of conflicting interests, the Court ignored the distinction between group one and group two cases (pp. 16-17, *supra*) and concluded that unlawful discrimination could not exist in the face of a business motivation for the discriminatory acts. The fact that these cases require a balancing of conflicting interests is further demonstration that the distinction between group one and group two cases is correct. For if, as the court below held, the existence of a business purpose negates the inference of intent to encourage or discourage union activity, then it would never be necessary to balance interests, and the balancing cases would have been decided in favor of the employers on the basis of the mere showing of the employer's economic motivation. See e.g. *Quaker State Oil Co. v. N.L.R.B.*, 270 F. 2d 40, cert. den. 361 U.S. 917.

Wilcox Co., 351 U. S. 105; *Republic Aviation Corp. v. N.L.R.B.*, 324 U. S. 793; *N.L.R.B. v. Continental Baking Co.*, 221 F. 2d 427, (C.A. 8); *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268; *International Shoe Co.*, 93 NLRB 907.

The Court below, misconstruing *Radio Officers'* and *Mackay Radio* and failing to recognize *Mackay* as a balancing case, inadvertently exceeded the scope of the review available to it and too narrowly confined the exercise of the Board's discretion.

Clearly the Board acted within the limits of its discretion in rejecting the proffer of economic necessity as a defense. Notwithstanding the amendments to the National Labor Relations Act since it was passed in 1935, the basic objective of the Act remains to insure to workers the right to organize themselves and to engage in collective bargaining. A fundamental policy expressed in Section 1 of the Act is to endow unions with collective bargaining powers and to redress the bargaining disadvantage of individuals which would exist without the protection of the Act. Among the key rights specifically protected by the Act is the right to strike guaranteed by Section 13. The Act underscores the protection of those who exercise that right by preserving in Section 2(3) their employee status while they strike and by outlawing in Section 8(a)(3) discrimination against them to discourage or encourage union membership.

Congress considered the protection of employee rights important not only for the direct benefit of the employees concerned, but also because of the general benefit to the public welfare to be derived from collective bargaining and the improvement of wages, hours, and working conditions resulting therefrom. (Section 1 of the Act, Findings and Policies.) Congress sanctioned strikes mindful of their impact upon employers, but with the knowledge that col-

lective bargaining could exist only where the right to strike existed to give substance to the Congressional effort to create bargaining equality.

Congress has twice amended the National Labor Relations Act since its passage. On both occasions, through the enactment of Section 8(b) in 1947, and the amendment and extension of Section 8(b) and the enactment of Section 8(e) in 1959, Congress has significantly circumscribed the kinds of economic pressure which may be placed on employers in conjunction with strike activity. As a result the kinds of economic pressure which may be imposed upon employers have largely been reduced to those effected through the withholding of the services of the employees of the struck employers.

In the light of the direct action taken by Congress to narrow and reduce the economic pressure which may lawfully be placed on an employer in an economic strike, the inference must be drawn that Congress intended to preserve unabridged the right to impose full economic pressure through the remaining avenues. Congress has amply demonstrated that it knows how to redress what it has felt to be improper or excessive pressures upon an employer.⁸ It took no action to permit an employer to undermine employee solidarity and relieve the pressure generated from withholding of services by permanently discriminating against strikers with respect to the terms of their reinstatement after the strike is over.

Indeed, in no case known to the Union has the balancing

⁸ See House Report No. 245 on H.R. 3020; 80th Cong., 1st Sess., and particularly pp. 12, 23-24, 27-28, 30, 44, 1 Legislative History of the Labor-Management Relations Act, 1947 (G.P.O. 1948), pp. 292, 303, 314, 315, 318-319, 321, 335; Senate Report No. 105 on S. 1126 80th Cong., 1st Sess., and particularly pages 7, 8, 20, 21-24, 25, 28, 1 Leg. Hist. 407, 413-414, 426, 427-430, 431, 434. That Congress did not intend to impair otherwise the right to strike effectively appears as well in the remarks of Senator Taft at 93 Cong. Rec. 3835, 2 Leg. Hist. 1007.

concept been applied to permit an employer's interest to override protected employee rights so as to create a continuing impairment of their terms and conditions of employment based upon participation in concerted activity. In *Mackay* and in the lockout cases cited above, at the conclusion of the strike or lockout, employees who returned to work were restored to their full rights.

Yet in this case, in addition to the lasting discrimination inherent in preferential seniority (pp. 28-29, *supra*), such a policy impairs future collective bargaining, the ultimate goal of the exercise of employee rights, and makes bargaining "difficult, if not impossible," as the Board recognized in its decision. (R. 15a.) Not only is a permanent division created between strikers and nonstrikers, but the preferential seniority policy stands as a monument to deter employees ever from striking again and thus to deprive them of any effective economic force in future negotiations, contrary to the understanding of Congress that the right to strike is essential to collective bargaining.

The balance was struck in *Mackay* to permit permanent replacement on the one hand, but to proscribe discrimination in regard to hire or tenure of employment upon reinstatement on the other. (See p. 30, *supra*.) Congress has evidenced no intention that this balance be changed. Clearly, the Board did not exceed its discretion in concluding that this balance should be continued. Indeed, in the light of the history of the Act since it was adopted, a different balance would usurp the function of Congress and impair the right to strike which Congress intended to preserve.

In *N.L.R.B. v. Drivers Local No. 639*, 362 U.S. 274, this Court stated:

"Section 13 is a command of Congress to the Courts to resolve doubts and ambiguities in favor of an inter-

pretation of Section 8(b)(1)(A) which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act."¹¹

Section 13 is no less a command to interpret Sections 8(a)(1) and 8(a)(3) to safeguard the right to strike.

CONCLUSION

For the reasons set forth above, the decision of the court below should be reversed and the order of the Board enforced.

Respectfully submitted,

BENJAMIN C. SIGAL,

DAVID S. DAVIDSON,

WINN I. NEWMAN,

Attorneys for

International Union of Electrical,

Radio and Machine Workers,

Local 613, AFL-CIO.

1126 16th St., N.W.,

Washington 6, D. C.

APPENDIX A**STATUTES INVOLVED**

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151 et seq.), are:

"Sec. 2. When used in this Act—

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or—because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . .

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 8(a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided That nothing in this Act, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to

require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 288

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.

ERIE RESISTOR CORPORATION AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 613, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Circuit Court proceedings pp. 14-21) is reported at 303 F. 2d 359. The findings of fact, conclusions of law and order of the Board (R. 3a-32a) are reported at 132 NLRB 621.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1962 (Circuit Court proceedings, p. 22). The petition for a writ of certiorari was filed on July 30, 1962, and was granted on October 8, 1962 (Circuit Court proceedings, p. 24). The jurisdiction of this

Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et. seq.*), are set forth in the Appendix, *infra*, pp. 40-42.

QUESTION PRESENTED

Whether it is a violation of Section 8(a)(1) and (3) of the National Labor Relations Act for an employer to discriminate between employees who strike and employees who work during a strike by awarding an additional arbitrary seniority credit—in this case 20 years—to replacements for strikers and also to strikers who return to work during the strike, so that in a subsequent lay-off, strikers who did not return to work until after the strike's termination were laid off as junior employees.¹

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Early in 1959, the Erie Resistor Corporation and Local 613 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, the representative of the company's production and maintenance employees, met to negotiate the terms of a new contract (R. 37a-38a; 73a-75a, 213a-232a).² The

¹ If this question is answered affirmatively, it follows that the Company refused to bargain, in violation of Section 8(a)(5) of the Act, by insisting that this or a similar form of super-seniority policy be made a part of any collective bargaining agreement (see *infra*, p. 9).

² References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

parties were unable to reach agreement and, on March 31, 1959, when the old contract expired, the Union called a strike in support of its demands, which was joined by all of the approximately 478 employees working in the unit (R. 4a; 69a-70a, 145a).³

Throughout April, the month following the commencement of the strike,³ the Company maintained production at approximately 15 to 30 percent of normal by transferring 140 clerical and other non-unit employees to production jobs (R. 4a; 409a-410a, 429a-430a, 451a, 522a). Although the Company had received applications for employment as early as a week or two after the strike began, it did not attempt until the next month to fill the production unit with employees from outside the plant (R. 4a; 393a-394a). On May 3, the Company notified all members of the Union by letter that it intended to begin hiring replacements and that strikers would retain their jobs until replaced (R. 4a; 230a, 560a-561a). In accordance with this notice, the Company began to hire replacements during the week of May 11, assuring the new employees, after they were accepted for employment, that they would not be discharged or laid off upon settlement of the strike (R. 4a; 174a, 367a).

In a bargaining session held on May 11, the Company told the Union that it was promising replacements job security and that it intended to implement this promise by according them some form of super-

³ In addition to the approximately 478 employees who went on strike, 450 employees in the unit were in layoff status (R. 5a, m 2; 69a-70a).

seniority (R. 4a; 120a, 200a-202a).⁴ At five bargaining sessions held between May 11 and May 28, the Company proposed several alternative forms of superseniority, offering to negotiate the precise nature of the seniority benefit to be accorded replacements but stating that superseniority in some form was "something that management people want and must have" (R. 4a, 21a; 120a, 200a-203a).⁵ The Union opposed the Company's various seniority proposals, contending that no matter what particular form superseniority might take it would necessarily work an illegal discrimination against the strikers (R. 4a; 224a). As significant progress was made in the negotiations on other issues, superseniority became the focal point of disagreement (R. 21a; 219a-222a, 356a).

By May 25, the Company had recalled 32 of the employees in layoff status, hired one new employee, and put four returning strikers to work in the production unit (R. 5a; 522a). On May 28, the Company informed the Union that it had decided to give both replacements and strikers who returned to work during the strike 20 years additional seniority, which would be used only upon future layoffs and would not affect employee benefits based on years of service (R. 5a-6a; 129a, 211a, 564a-565a). At a union meeting on May 29, the strikers unanimously resolved to con-

⁴ When the strike started, a male employee needed seven years seniority to avoid layoff; a female employee, nine years (R. 5a, n. 2; 70a).

⁵ At this time the city of Erie was classified by the United States Department of Labor as an area of severe unemployment; at least 12 percent of the total labor force was unemployed (R. 6a, n. 3; 188a-189a, 587a).

tinue striking "until management stops its unfair labor practice by making us agree to * * * superseniority [for] the scabs" (R. 6a; 274a). That weekend, May 30 and 31, the Union publicized the Company's 20-year superseniority plan over the local television station (R. 6a; 173a).

By the end of the first week in June, the Company had hired a total of 57 replacements and reinstated eight returning strikers (R. 522a). During that same week, the Company and Union reached agreement on several seniority provisions which had been in dispute, but superseniority remained in issue (R. 6a; 126a-127a). On June 10, the Company wrote a letter to all employees and members of the Union, making its first announcement to them of the 20-year superseniority plan (R. 6a; 130a-131a). Although the Union offered to give up union security if the Company would abandon superseniority or go to arbitration on the question, and threatened to continue striking if it did not, the Company position remained firm and no agreement was reached (R. 6a; 332a-333a).

By June 14, 81 replacements (47 employees recalled from layoff status and 34 new employees), and 23 returning strikers had accepted production unit jobs (R. 7a; 394a-395a, 522a). On June 15, the Company posted the 20-year superseniority plan on its bulletin board (R. 7a; 122a). In the following week, 64 strikers returned to work and 21 replacements took jobs in the unit, bringing the total number of replacements to 102 and returned strikers to 87 (R. 7a; 394a-395a; 522a). When the number of returned strikers went up to 125 in the week beginning June

22, the Union decided it had to settle the strike. It offered to withdraw the picket line and submit the superseniority issue to the Board, and the parties drew up a tentative agreement on the remaining economic issues (R. 7a; 212a-214a, 522a). Although the Company notified the Union on the evening of June 24 that it would not accept the terms of the tentative agreement, the Union, on June 25, nonetheless called an end to the strike and requested reinstatement for the strikers (R. 7a; 43a, 166a, 212a-216a, 567a).

The next day the Company gave the Union a list of 129 strikers whom the Company would not reinstate because their jobs had been filled by replacements (R. 7a; 228a-229a).⁶ In the next few weeks following the strike's termination, the Union received approximately 173 resignations from membership (R. 16a; 260a-263a).

On July 17, 1959, the parties executed a settlement agreement, providing that the propriety of the "Company's replacement and job assurance policy" should be "resolved by the NLRB and the Federal Courts" and should "remain in effect pending final disposition" (R. 7a-8a; 578a). The Company and Union also executed a new contract on this date (R. 8a; 316a, 580a).

Following the strike's termination, the Company began to reinstate those strikers who had not been replaced (R. 7a; 411a-412a). In September 1959, the Company's production unit work force reached a

⁶ The Company had received approximately 300 job applications which had not been processed at the strike's end (R. 6a; 392a-393a).

high of 442 employees (R. 7a; 399a-400a, 523a). Economic layoffs in succeeding months, however, gradually reduced the work force to 240 by May 1960 (R. 7a; 399a-400a, 524a). A large number of employees laid off during this cut-back period were reinstated strikers whose seniority concededly became insufficient to retain employment solely as a result of the Company's superseniority policy (R. 7a; 176a).

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board held that the Company's policy of granting 20 years superseniority for replacements and returning strikers violated Section 8(a) (1) and (3) of the Act, irrespective of the Company's possible economic justification therefor (R. 18a-19a). In the Board's view, the policy greatly diminished the right to strike guaranteed by the Act and, since it discriminated against employees solely on the basis of their participation in a strike called by their union representative, discouragement of union activity was "inescapable and demonstrable." Thus, a violation of Section 8(a) (1) and (3) was established without a showing that the employer subjectively intended to discourage union activity. Nor, in the Board's view, was the policy privileged by *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (discussed *infra*, pp. 20-26, 36-38), for "superseniority is a form of discrimination extending far beyond the employer's right

The board, therefore, declined to pass on the Company's contention that it was economically necessary to institute superseniority in order to obtain striker replacements (R. 19a, n. 29).

of replacement sanctioned by *Mackay*" (R. 11a). Having found that the superseniority arrangement violated Section 8(a) (1) and (3) of the Act, the Board further concluded that the Company refused to bargain, in violation of Section 8(a)(5), by insisting, as a condition to reaching a collective bargaining agreement with the Union, that the agreement contain a clause ratifying the Company's grant of superseniority (R. 20a-21a).

The Board, *inter alia*, ordered the Company to rescind its superseniority policy and to reinstate with back pay any recalled strikers laid off solely as a result of the policy; to bargain with the Union upon request; and to post appropriate notices (R. 25a-28a).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals declined to enforce the Board's order. The court stated (Circuit Court proceedings, p. 21):

We reject as unsupportable the rationale of the Board that a preferential seniority policy is illegal however motivated. We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the con-

* The Board also found that on May 29, when the Union voted to continue striking until the Company stopped insisting on superseniority (*supra*, pp. 4-5), the strike became an unfair labor practice strike. Accordingly, the strikers not replaced by that date were unlawfully discriminated against when the Company denied their unconditional offer to return to work on June 25, 1959 (R. 20a-22a). To remedy this further discrimination, the Board ordered the Company to offer reinstatement to strikers who had not been replaced by May 29 and who offered to return on June 25, and to compensate such strikers for any loss in wages attributable to the June 25 refusal (R. 23a-24a).

comitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy * * *?

INTRODUCTION AND SUMMARY OF ARGUMENT

The critical issue is whether respondent's promise of superseniority to strike-breakers and concomitant reduction of strikers to inferior status violated Sections 8(a) (1) and (3) of the National Labor Relations Act. If this was a violation, the strike admittedly became an unfair labor practice strike and the Board's order was proper. *National Labor Relations Board v. Remington Rand, Inc.*, 130 F. 2d 919, 927-928 (C.A. 2). It is also clear that, if the superseniority plan was unlawful, there was a refusal to bargain in violation of Section 8(a)(5). *National Labor Relations Board v. Wooster Division of Borg-Warner*, 356 U.S. 342.

I. Sections 7 and 8(a)(1), read together, make it an unfair labor practice "to interfere with, restrain,

* The holding of the court below, although in accord with that of the Ninth Circuit in *National Labor Relations Board v. Potlatch Forests, Inc.*, 189 F. 2d 82, is in conflict with that of the Sixth Circuit in *Swarco, Inc. v. National Labor Relations Board*, 303 F. 2d 668, petition for certiorari pending, No. 335, this Term. In three other cases, superseniority plans have been held to violate the Act, but the evidence in those cases warranted a finding that the plans were motivated by a desire to penalize the strikers rather than by economic considerations. *Olin Mathieson Chemical Corp. v. National Labor Relations Board*, 232 F. 2d 158 (C.A. 4), affirmed, 352 U.S. 1020; *National Labor Relations Board v. California Date Growers Ass'n*, 259 F. 2d 587 (C.A. 9); *Ballas Egg Products, Inc. v. National Labor Relations Board*, 283 F. 2d 871 (C.A. 6).

or coerce employees in the exercise of the * * * right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." A normal strike for economic objectives is a concerted activity protected by Sections 7 and 8 (a)(1). To reward the strike-breakers—the replacements and the employees who returned to work despite the strike—by giving them top seniority and to punish the strikers by putting them on the bottom of the roster does in fact coerce and restrain employees in the exercise of the right to strike. The trial examiner found that the employer's motive was not to punish but to induce enough employees to come to work to operate the factory despite the strike. The Board correctly held that the ultimate motive for the coercion and restraint was irrelevant. The coercion and restraint obviously occurred; few things could be more coercive in relation to a strike than to gain seniority by returning to work and to lose it by continuing on strike. The coercion was intended, for it was the patently inescapable consequence of the employer's acts. An unfair labor practice is not excused by the employer's belief that it is the most effective way to operate his business.

Nor is this case like *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, where the Court held that in the absence of an unfair labor practice an employer is not required to make room for the reinstatement of strikers by discharging employees hired as permanent replacements during a strike. The guarantee of super-seniority goes far beyond the mere hiring of employees

to operate a plant during a strike upon the same conventional basis as workers are normally hired—at will but with the expectation of continuing employment unless discharged for inefficiency or misconduct or laid-off for lack of work. Its impact continues into the indefinite future. It divides the labor force permanently into two groups—those whose jobs are made relatively insecure because they remained loyal to a lawful strike and those whose job security is enhanced because they went or returned to work before the strike was over. Where there is a conflict between the interest of employees in freedom to strike without restraint or coercion, on the one hand, and of the employer in resuming operations, on the other hand, it is the responsibility of the Board to balance the conflicting legitimate interests, subject only to limited judicial review. The balance struck by the Board in this case correctly effectuates the national labor policy and should not have been reversed by the court of appeals.

II. Respondent's superseniority program also violates Section 8(a)(3). It discriminates among employees, as pointed out above, on the basis of their participation in concerted activities protected by Section 7. Both the Board and the courts have uniformly treated such discrimination as a violation of Section 8(a)(3) because the natural and probable consequence of discriminating against employees who engage in concerted activities sponsored by a union is to discourage membership in the union.

An employer may not justify discrimination on the basis of union membership or activity by proof that

it was necessary to the successful operation of his business. For example, it was settled as early as 1938 that an employer who discharged his employees who were members of one labor union could not justify the discrimination by showing that the discharges were necessary to induce another union to remove a picket line that halted the operation of his business. *National Labor Relations Board v. Star Publishing Co.*, 97 F. 2d 465 (C.A. 9). Here, as there, the ultimate motive is immaterial.

Nor was it necessary for the Board to offer proof of a specific intent to discourage union membership. Proof of this motive or intent is highly relevant in the conventional discharge case where the question is whether the employer has in fact discriminated against an employee (i.e., treated him differently from other employees) by reason of his union membership. But when union membership is the stated ground for differentiation no further proof is required because the employer is then responsible for the discouragement to union membership which is the natural and probable consequence of the discrimination. *Radio Officers v. National Labor Relations Board*, 347 U.S. 17, 44-45. The same rule should apply where the discrimination is avowedly based upon union-sponsored activities protected by Section 7.

ARGUMENT**I****THE AWARD OF SUPERSENIORITY TO NON-STRIKERS AND
REPLACEMENTS VIOLATED SECTION 8(a)(1) BY RE-
STRAINING AND COERCING EMPLOYEES IN THE EXERCISE
OF THE RIGHT TO STRIKE****A. RESTRAINT OR COERCION OF EMPLOYEES IN THE EXERCISE OF
THE RIGHT TO STRIKE VIOLATES SECTION 8(a)(1)**

Section 8(a)(1) provides that it shall be an unfair labor practice for an employer—

to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

One of the rights guaranteed by Section 7 is "the right * * * to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." It is settled law that this includes the right to strike. *Automobile Workers v. O'Brien*, 339 U.S. 454, 457; *Bus Employees v. Wisconsin Board*, 340 U.S. 383, 389, 404; *Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62, 75.

It is equally well settled that conduct which coerces or restrains employees in the exercise of the right to strike violates Section 8(a)(1) and, for reasons we state below, also Section 8(a)(3) of the Act. Thus an employer may not discharge employees for going on strike, or threaten them with discharge, telling all employees who fail to report back for work that they will be treated as having resigned.¹⁰ It is an unfair

¹⁰ *National Labor Relations Board v. Remington Rand, Inc.*, 130 F. 2d 919, 927-928 (C.A. 2); *J. A. Bentley Lumber Co. v.*

labor practice to assign employees—because they resorted to concerted activities—to less desirable jobs, to deny them vacation or bonus benefits, or to lay them off or deprive them of accumulated seniority.¹¹

Respondent's conduct, as we now show, is condemned by the foregoing rule. Its seniority program restrained and coerced employees for engaging in concerted activities by continuing a lawful strike.

National Labor Relations Board, 180 F. 2d 641, 642 (C.A. 5); *National Labor Relations Board v. Kennametal Inc.*, 182 F. 2d 817, 818-819 (C.A. 3); *Cusano v. National Labor Relations Board*, 190 F. 2d 898, 901 (C.A. 3); *National Labor Relations Board v. Globe Wireless*, 193 F. 2d 748, 750 (C.A. 9); *National Labor Relations Board v. U.S. Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5); certiorari denied, 346 U.S. 818; *National Labor Relations Board v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (C.A. 6); *National Labor Relations Board v. Beaver Meadow Creamery*, 215 F. 2d 247, 252 (C.A. 3); *National Labor Relations Board v. McCotron*, 216 F. 2d 212, 214-215 (C.A. 9), certiorari denied, 348 U.S. 943; *National Labor Relations Board v. Brookville Glove Co.*, 234 F. 2d 400, 401 (C.A. 3); *Summit Mining Corp. v. National Labor Relations Board*, 260 F. 2d 894, 897-898 (C.A. 3); *National Labor Relations Board v. John S. Swift Company*, 277 F. 2d 641, 646 (C.A. 7); *Editorial "El Imparcial," Inc. v. National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1).

¹¹ *Republic Steel Corp. v. National Labor Relations Board*, 114 F. 2d 820, 821 (C.A. 3); *National Labor Relations Board v. Remington Rand, Inc.*, 130 F. 2d 919, 931 (C.A. 2); *National Labor Relations Board v. A. Sartorius & Co.*, 140 F. 2d 203, 205, 207 (C.A. 2); *Olin Industries, Inc. v. National Labor Relations Board*, 191 F. 2d 613, 616 (C.A. 5); *National Labor Relations Board v. Wheeling Pipe Line, Inc.*, 229 F. 2d 391, 394-395 (C.A. 8); *National Labor Relations Board v. Solo Cup Co.*, 237 F. 2d 521, 525-526 (C.A. 8); *National Labor Relations Board v. M & M Bakeries, Inc.*, 271 F. 2d 602, 605 (C.A. 1); *Editorial "El Imparcial," Inc. v. National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1).

B. THE AWARD OF SUPERSENIORITY TO NON-STRIKERS AND REPLACEMENTS IN FACT RESTRAINS AND COERCES EMPLOYEES IN THE EXERCISE OF THE RIGHT TO STRIKE

A seniority program that prefers non-strikers over strikers is manifestly coercive in fact regardless of the employer's motive. The worker who accepts employment during the strike and the employee who returns to work are rewarded while the employee who stays on strike is penalized, each for as long as he remains in the bargaining unit. In the present case the strike-breakers—the replacements and the employees who returned to work—were credited with 20 years additional service in preparing seniority rosters. The net effect is that, barring a few long-service employees, all strike-breakers will permanently have a preference over all strikers in obtaining and holding jobs in the event of vacancies and layoffs. The announcement of such a program threatens strikers with heavy economic sanctions. Its implementation in future years would stand as a constant warning of the penalties of going on strike.

It is equally apparent that the restraint and coercion were intended—assuming *arguendo* that intent is relevant. The intent to restrain and coerce is not to be confused with the employer's ultimate motive, which the Examiner found to be to resume operation of the plant, and which the Board regarded as irrelevant. One who breaks a jewelry store window to reach and steal a diamond ring may be motivated by a desire to raise money to feed his hungry children but he intends nonetheless to break the window and take the ring. The success of respondent's plan for resuming operations depended upon its threatening severe enough

sanctions against those who continued the strike to coerce employees to return to work. Nor can it be fairly said that there were no threats against strikers, but only a promise of benefit to strike-breakers. Each strike-breaker who was awarded greater seniority could receive it only at the expense of an employee who exercised the right to strike. Thus, the sword was two-edged—a promise of benefits for some which was inseparable from the penalty imposed against others for exercising the statutory right that Sections 7 and 8(a)(1) protect.

The trial examiner and court of appeals accepted respondent's argument that the coercion and restraint which in fact were used were not unlawful because respondent's purpose was to get its plant back into operation and not merely to punish employees for going on strike. The argument overlooks a critical distinction. Normal business conduct, such as granting a wage increase, reducing wages, laying off an extra shift or shutting down a plant may have the incidental consequence of interfering with union activities but it is lawful unless the employer is acting not for normal business reasons but for the purpose of interfering with those activities. *National Labor Relations Board v. Whittier Mills Co.*, 111 F. 2d 474, 478-479 (C.A. 5); *National Labor Relations Board v. Moltrup Steel Products Co.*, 121 F. 2d 612, 613-614 (C.A. 3); *National Labor Relations Board v. Wallack*, 198 F. 2d 477, 483 (C.A. 3); *National Labor Relations Board v. Norma Mining Corp.*, 206 F. 2d 38, 42 (C.A. 4); *National Labor Relations Board v. Cleveland Trust Co.*, 214 F. 2d 95, 99 (C.A. 6); *National Labor Relations Board v. New Madrid Mfg. Co.*, 215 F. 2d 908,

911-912 (C.A. 8); *National Labor Relations Board v. The Newton Co.*, 236 F. 2d 438, 446 (C.A. 5). See also *Joy Silk Mills v. National Labor Relations Board*, 185 F. 2d 732, 739 (C.A. D.C.), certiorari denied, 341 U.S. 914. The reason is that the employer has the privilege to interfere with the employees' interests, in such cases, in order to carry on normal business functions, but his immunity exists only if he acts for the purpose for which the privilege was given; should his motive be anti-union, the privilege will not protect him. See *National Labor Relations Board v. Kelly & Piecne*, 298 F. 2d 895, 898 (C.A. 1); *National Labor Relations Board v. Brown-Dankin*, 287 F. 2d 17, 19 (C.A. 10); *National Labor Relations Board v. Houston Chronicle*, 211 F. 2d 848, 851 (C.A. 5). This is not a special rule applicable to labor cases. It accords with the general law of torts. See *National Labor Relations Board v. Columbia Products Corp.*, 141 F. 2d 687, 688 (C.A. 2).

There are many instances, on the other hand, in which the employer's "good" motive is irrelevant because he has singled out union membership or activity and imposed coercion or restraints thereon which so impair employee rights that, on balance, the action cannot be justified by its ultimate business purpose. Thus the employer's motive has been held irrelevant where he prohibited the wearing of union buttons in the plant, forbade the solicitation of members on plant property even though the employees were not working, or prohibited the employees from distributing union pamphlets in the company parking lot. *Republic Aviation Co. v. National Labor Relations Board*, 324 U.S. 793.

Similarly, an employer cannot justify the discharge of union members upon the ground that this is the only way to induce a rival union to remove a picket line and permit the resumption of business operations. *National Labor Relations Board v. Star Publishing Co.*, 97 F. 2d 465 (C.A. 9). Nor may an employer defend his refusal to bargain about a certain topic or about the working conditions of certain groups of employees upon the ground that the bargaining would interfere with proper operation of the business. *McQuay-Norris Mfg. Co. v. National Labor Relations Board*, 116 F. 2d 748, 752 (C.A. 7); *National Labor Relations Board v. National Broadcasting Co.*, 150 F. 2d 895, 900 (C.A. 2); *National Labor Relations Board v. Harris*, 200 F. 2d 656, 659 (C.A. 5); *National Labor Relations Board v. Parma Water Lifter Co.*, 211 F. 2d 258, 263 (C.A. 9); see also *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 162 F. 2d 435, 440 (C.A. 7). Indeed, we suppose that a good proportion of employers could conscientiously assert that their unfair labor practices were not malicious or vindictive but were motivated by their judgment as to the best interests of the business. Such motives, however, will not excuse conduct which violates rights guaranteed by Section 7.

Accordingly, the present case comes down not to a question of motive but to the question whether the coercion and restraint of employees in their right to engage in concerted activities, which results from a program of giving superseniority to strike-breakers, can be justified by its usefulness to

an employer in resuming business operations during a strike. If the National Labor Relations Act recognizes the privilege of giving superseniority, then the employer's motive in a particular case may be material since he would lose the privilege if he acted not for the business purpose but out of a desire to exact reprisals against the striking employees. On the other hand, if the law gives no such privilege because the damage to employees' rights outweighs the employer's interests when the two are balanced with a view toward effectuating the policies of the National Labor Relations Act, then the employer's motive is utterly irrelevant.

We turn now to the critical question..

C. THE RESTRAINT AND COERCION OF EMPLOYEE RIGHTS THAT IN FACT RESULTS FROM GIVING SUPERSENIORITY TO STRIKE-BREAKERS CANNOT BE LEGALLY JUSTIFIED BY THE EMPLOYER'S INTEREST IN RESUMING BUSINESS OPERATIONS DESPITE THE STRIKE

The right to strike, peacefully and for normal labor objectives, is one of the fundamental rights protected by the National Labor Relations Act. Not only is it protected as a concerted activity under Section 7 (see pp. 13-14, *supra*), but Section 2(3) provides that individuals who strike shall not lose their status as "employees"; and Section 13 cautions that, "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike."

Discrimination against strikers, threatening them with reprisals unless they abandon the strike, or im-

posing penalties upon strikers all are unfair labor practices under Sections 8(a) (1) and (3).¹²

Many of these cases implicitly reject the notion that the interference, restraint and coercion can be justified by the employer's desire to induce the strikers to return to work. This is the obvious purpose of such tactics as announcements that all employees who do not return to work will be treated as voluntary quits and rehired only as new employees; yet those tactics have uniformly been held unlawful.¹³

¹² *J. A. Bentley Lumber Co. v. National Labor Relations Board*, 180 F. 2d 641, 642 (C.A. 5); *National Labor Relations Board v. Kennametal, Inc.*, 182 F. 2d 817, 818, 819 (C.A. 3); *Cusano v. National Labor Relations Board*, 190 F. 2d 898, 901 (C.A. 3); *Collins Baking Co. v. National Labor Relations Board*, 193 F. 2d 483, 485-487 (C.A. 5); *National Labor Relations Board v. Globe Wireless*, 193 F. 2d 748, 750 (C.A. 9); *National Labor Relations Board v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (C.A. 6); *National Labor Relations Board v. McCatron*, 216 F. 2d 212, 214-215 (C.A. 9), certiorari denied, 348 U.S. 943; *National Labor Relations Board v. Wheeling Pipe Line, Inc.*, 229 F. 2d 391, 394-395 (C.A. 8); *Olin Mathieson Chemical Corp. v. National Labor Relations Board*, 232 F. 2d 158 (C.A. 4), affirmed, 352 U.S. 1020; *National Labor Relations Board v. California Date Growers Assoc.*, 259 F. 2d 587 (C.A. 9); *National Labor Relations Board v. M & M Bakeries, Inc.*, 271 F. 2d 602, 605 (C.A. 1); *Editorial "El Imparcial," Inc. v. National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1); *Ballas Egg Products, Inc. v. National Labor Relations Board*, 283 F. 2d 871 (C.A. 6). For a more complete discussion of the analysis under Section 8(a)(3), see pp. 27-28, *infra*.

¹³ *Cusano v. National Labor Relations Board*, 190 F. 2d 898, 901 (C.A. 3); *National Labor Relations Board v. U.S. Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818; *National Labor Relations Board v. Beaver Meadow Creamery*, 215 F. 2d 247, 252 (C.A. 3); *National Labor Relations Board v. Brookville Glove Co.*, 234 F. 2d 400, 401 (C.A. 3); *Editorial "El Imparcial," Inc. v. National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1).

We recognize that the right to strike is not so absolute that Section 8(a)(1) can be read to prohibit every interference. The employer is privileged to operate the plant during the strike and, where his interest collides with the interests of the employees, the Board and courts must strike a balance. Thus, in *National Labor Relations Board v. Mackay Radio & Tel. Co.*, 304 U.S. 333, the Court held that an employer may hire permanent replacements during a strike and retain them in their jobs thereafter in preference to strikers seeking reinstatement, even though this method of filling the strikers' places tends to discourage them from remaining on strike. Similarly, it was held in *National Labor Relations Board v. Truck Drivers, Local No. 449*, 353 U.S. 87, that the employer's interest in maintaining the integrity of a multi-employer bargaining unit might justify the interference with the exercise of the right to strike that resulted from locking out all the employees in the unit when the employees of one employer went on strike. "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review" (*id.* at 96).

In the present case, we submit, the balance struck by the Board is plainly correct. The practice of granting superseniority is utterly unlike the hiring of permanent replacements sanctioned in the *Mackay* case. There it was but a step in the normal conduct of the business. In the United States industrial

workers and most craftsmen are hired at will but with the expectation of continued employment unless the employee is discharged for cause or dismissed for lack of work. Hiring permanent replacements, therefore, conformed to normal hiring practices, except that the number required was greater because of the strike. Granting an arbitrary 20 years additional seniority to those who commence or return to work during the strike is a complete departure from all normal business practices, a departure developed by a few business firms as a method of breaking strikes. Nor can it fairly be said that the superseniority is like a temporary pay bonus to attract additional workers during a strike, assuming *arguendo* that such a bonus would be legal.¹⁴ The guarantee of seniority to some is inevitably a permanent sentence of inferiority for others; the reward and penalty are inextricable.

As the Board pointed out (R. 11a), the degree of interference with protected rights is much greater when a system of superseniority is imposed than when the employer limits himself to hiring permanent replacements:

* * * permanent replacement affects only those who are, in actuality, replaced,⁹ while superseniority for replacements affects the employment tenure of all strikers, whether or not replaced. It is one thing to say that a striker is subject to replacement, and therefore loss of his job at the strike's end; quite another to say that, in addition to the threat of replacement, and regardless of the employer's success in securing a replacement for the individual strik-

¹⁴ The assumption is probably contrary to the actual rule. See, however, the cases cited in n. 16, *infra*.

ers, all strikers will at best return to their jobs with inferior seniority, thus incurring a detriment to their job security forever. Clearly, this is a discrimination in addition to the threat of replacement, and not merely a lesser form of discrimination encompassed by it.

Permanent replacement is a definable risk which the striker can measure, with some degree of certainty, in determining whether he will exercise his Section 7 rights.¹⁴ He knows that, if he strikes, the only danger is that the employer may be able to obtain someone else, on a permanent basis, to take his job; he can make a judgment as to the likelihood of this occurring, and, if at the strike's end it has not happened, he is assured that no adverse consequences will result from the strike. On the other hand, a superseniority plan will "hit" the employee who elects to remain on strike even though the employer has not been able to accomplish the more difficult task of finding a permanent replacement for him; and it leaves the employee in a state of uncertainty, long after the strike has ended, as to how severely he will be affected.

Permanent replacement merely affects the particular job which is filled; the striker who had that job is displaced, but the status of the other employees in the plant remains unchanged. The grant of a seniority preference to those who work during a strike has effects which transcend the jobs which are "filled" as a result of this policy. By its very nature seniority

¹⁴ Cf., *National Labor Relations Board v. Industrial Cotton Mills*, 208 F. 2d 87, 91 (C.A. 4), certiorari denied, 347 U.S. 835; "The right to reinstatement granted to a blameless un-replaced striker is designed to set the limit of the risk he runs by striking. That limit *** is fixed at replacement by the employer or misconduct by the employee."

is a relative matter, and hence giving a seniority advantage to one particular group of employees must necessarily, not only improve their position, but also deteriorate the position of the other employees. See *General Electric Co.*, 80 NLRB 510, 512-513. A seniority preference therefore does more than assure an individual that, at the end of the strike, he will not be thrown out of the job which he takes during the strike; it gives him a superior claim, in the event that work should decline in the future, to other jobs as well.

The Board's experience has shown that "superiority is normally offered not only to new employees—if to them at all—but to the bargaining unit employees themselves, if they abandon the strike or choose not to join it" (R. 12a-13a).¹⁵ In reality, therefore, "an offer of superseniority is not merely an attempt to secure new 'replacements', but more accurately an offer of benefit to individual strikers

¹⁵ In the instant case, it was offered to both new employees and strikers who returned to work. It was offered only to returning strikers in *Swarco, Inc. v. National Labor Relations Board*, 303 F. 2d 668 (C.A. 6), petition for certiorari pending, No. 335, this Term, and to returning strikers and other employees in *National Labor Relations Board v. Potlatch Forests, Inc.*, 189 F. 2d 82 (C.A. 9), and *Olin Mathieson Chemical Corp. v. National Labor Relations Board*, 232 F. 2d 158 (C.A. 4), affirmed, 352 U.S. 1020. As the Board stated (R. 12a, n. 18): "In none of the cases heretofore considered by the Board has superseniority been offered only to new employees." This is doubtless due to the fact that, if any bargaining unit employees are willing to go to work during a strike, the employer, as a practical matter, cannot place them in a worse position than newly hired employees.

to abandon the strike and return to work" (R. 13a).¹⁶ As a consequence, superseniority effectively divides the strikers against themselves. As the Board observed (R. 14a): "All employees formerly on layoff, and younger strikers with low seniority, immediately see their chance-of-a-lifetime to gain at one stroke the security which only long years of employment could theretofore give them; employees longer in the employer's service sense the threat and are impelled to return to work to protect their seniority."¹⁷

Superseniority for those who work during a strike makes future bargaining difficult, if not impossible, for the collective bargaining representative. The right permanently to replace strikers, sanctioned by *Mackay*, ceases to be an issue when the strike is over. Superseniority, on the other hand, remains "a mutual irritant to the employees and to the Union" (R. 16a). Here, for example, the employees were perpetually divided into two factions—those who continued to

¹⁶ In other contexts, such an offer of benefits to strikers has been held to constitute an independent violation of Section 8(a)(1) of the Act. See *National Labor Relations Board v. Bradley Washfountain Co.*, 192 F. 2d 444, 153 (C.A. 7); *National Labor Relations Board v. Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898, 905 (C.A. 6), affirmed, 356 U.S. 342; *National Labor Relations Board v. Clearfield Cheese Co.*, 213 F. 2d 70, 73 (C.A. 3); *National Labor Relations Board v. James Thompson & Co.*, 208 F. 2d 743, 748 (C.A. 2).

¹⁷ The present case illustrates the point. At the inception of the strike, all 478 employees in the bargaining unit honored the picket line or joined in strike activities. On June 10, the Company announced the superseniority plan in a letter to all employees and Union members. Thereafter, the total number of strikers who abandoned the strike steadily rose (R. 156; *supra*, pp. 4-6).

strike to the end and thus lost their seniority, and those who returned before the end of the strike and therefore have 20 years extra seniority. As the Board noted (R. 16a):

This difference is reemphasized with each subsequent layoff, for those who supported the union most faithfully are likely to be the first laid off. It is doubtful whether the Union can ever again succeed in calling, or even threatening, a strike for those with 20 years superseniority will be fearful that this time replacements may, perhaps, be granted 40 years superseniority. Those who were lucky enough not to be replaced during the first strike will prefer to remain at work, and regain the seniority so abruptly lost during the first strike. The effective reward of nonstrikers and punishment of strikers inherent in superseniority stands as an ever-present reminder of the dangers connected with striking, and with union activities in general.

In light of the foregoing factors, we submit that the Board was reasonable in concluding that the right to hire replacements for strikers, recognized in *Mackay*, does not carry with it the right to impose the additional discrimination of superseniority whenever necessary to secure such replacements. Since "the Board correctly balanced the conflicting interests" (*National Labor Relations Board v. Truck Drivers, Local No. 449*, 353 U.S. 87, 97), its decision is entitled to stand.

II. THE AWARD OF SUPERSENIORITY TO NON-STRIKERS AND REPLACEMENTS VIOLATED SECTION 8(a)(3) BY DISCRIMINATING AGAINST EMPLOYEES WHO EXERCISED THE RIGHT TO STRIKE GUARANTEED BY SECTION 7, THEREBY DISCOURAGING MEMBERSHIP IN THE LABOR ORGANIZATION THAT SPONSORED THE STRIKE

Section 8(a)(3) provides that it shall be an unfair labor practice for an employer—

by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Thus, there are two elements to the offense: (1) improper discrimination and (2) resulting encouragement or discouragement of union membership. *Radio Officers v. National Labor Relations Board*, 347 U.S. 17, 42-43; *Teamsters Local v. National Labor Relations Board*, 365 U.S. 667, 674-676.

Respondent's superseniority plan accomplished an unlawful discrimination. It divided the labor force permanently into two groups—those whose jobs were made relatively insecure because they remained loyal to a lawful strike and those whose job security was enhanced because they went or returned to work before the strike was over. The line was drawn, therefore, on the basis of whether an employee exercised the right to continue to engage in a concerted activity, a right guaranteed by Section 7.

Discrimination among employees based upon their participation or non-participation in union activities protected by Section 7 manifestly encourages or discourages membership in the labor organization. When

a union calls a strike or engages in other protected concerted activities and the employer exacts reprisals against those who exercise the protected rights, not only those employees who suffer, but others who observe the consequences of engaging in concerted activities for the purposes of collective bargaining, will lose interest in the union.¹⁸ The Board and reviewing courts have, therefore, uniformly held that discrimination against employees for engaging in concerted activities protected by Section 7 is unfair discrimination under Section 8(a)(3).¹⁹

The court below erred in holding that "the discriminatory conduct of an employer is not unlawful in the

¹⁸ Following the strike there were some 173 resignations from the Union (R. 16a; 260a-263a). Moreover, the subsequent layoff of a large number of strikers pursuant to the Company's super-seniority policy, the continuous threat of future layoffs based on strike activity, and the consequent weakening of the Union's collective bargaining position, could scarcely fail to have a further discouraging effect on union membership.

¹⁹ *Radio Officers v. National Labor Relations Board*, 347 U.S. 17, 39-40; *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 132; *Joanna Cotton Mills v. National Labor Relations Board*, 176 F. 2d 749, 752 (C.A. 4), enforcing 81 NLRB 1398; *National Labor Relations Board v. Kennametal, Inc.*, 182 F. 2d 817, 818-819 (C.A. 3); *National Labor Relations Board v. Smith Victory Corp.*, 190 F. 2d 56 (C.A. 2); *National Labor Relations Board v. Globe Wireless*, 193 F. 2d 748, 750 (C.A. 9); *National Labor Relations Board v. Southern Silk Mills, Inc.*, 209 F. 2d 155 (C.A. 6); *National Labor Relations Board v. McCatron*, 216 F. 2d 212, 214-215 (C.A. 9), certiorari denied, 348 U.S. 943; *National Labor Relations Board v. Solo Cup Co.*, 237 F. 2d 521, 525-526 (C.A. 8); *Summit Mining Corp. v. National Labor Relations Board*, 260 F. 2d 894, 897-898 (C.A. 3); *National Labor Relations Board v. John S. Swift Company*, 277 F. 2d 641, 646 (C.A. 7); *Editorial "El Imparcial," Inc. v. National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1).

absence of an illegal motive" (R. 18). When the fact of improper discrimination—discrimination based upon union membership or activities—has been proved, no further evidence of specific intent to encourage or discourage union membership is required, provided that the result, as will usually be the case, is the natural and probable consequence of the discrimination. Motive is important only in determining whether there has been discrimination, and perhaps in determining whether discrimination based upon grounds other than union membership or activity is in truth designed to encourage or discourage union membership. See pp. 32-33, *infra*.

The decisions of this Court establish the foregoing distinction. In *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, the employer had promulgated rules against wearing union buttons and soliciting union membership within the plant even during the employees' free time. When the employer discharged employees for violating the rule, the Board held that the rule violated Section 8(a)(1) and that the discharges violated Section 8(a)(3). In this Court the employer argued that there was no violation of Section 8(a)(3) even if the rules were unlawful because the rules were uniformly enforced, and the Court noted that the employer's action was not (p. 795) "motivated by opposition to the particular union or, we deduce, to unionism" and that (p. 797) "there was no union bias or discrimination by the company in enforcing the rule." Nevertheless, the Court sustained the Board. 324 U.S. at 805. The rules were held an undue interference with the rights

guaranteed by Section 7, not privileged because of the employer's interest in regulating the conduct of employees on his property. The discharges were also held to violate Section 8(a)(3). As this Court later explained in *Radio Officers v. National Labor Relations Board*, 347 U.S. 17, 46 (emphasis added)—

Since the rules were no defense and the employers intended *to discriminate solely on the ground of such protected union activity*, it did not matter that they did not intend to discourage membership since such was a foreseeable result.

The Court applied the same principle in *Gaynor News Co. v. National Labor Relations Board*, 347 U.S. 17, a case decided in the same opinion as *Radio Officers*. In *Gaynor*, the company granted retroactive wage increases to union members but withheld the same benefits from other employees in the bargaining unit who were not members of the union. There was no evidence of a specific intent on the part of the employer to encourage union membership. It acted, the Court said, "from self-interest" and discriminated against the non-members "on the grounds that it was not contractually bound [to pay them the increase] and, in its business judgment, did not choose to do so" (347 U.S. at 36 and 37). Nevertheless, the Court held that Section 8(a)(3) had been violated (*id.* at 46) (emphasis added)—

In holding that a natural consequence of discrimination, *based solely on union membership or lack thereof*, * * * the court [below] merely recognized a fact of common experience—that,

the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action. * * *

The reason underlying the rule that further proof of a specific intent to encourage or discourage union membership is not necessary after it appears that "the employer intended to discriminate solely on the ground of such protected union activity" or "solely on union membership status" was stated earlier in the *Radio Officers* opinion (347 U.S. at 45)—

* * * an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established. * * *²⁰

²⁰ In further support of the proposition that proof of an intent to encourage or discourage union membership is not required in these circumstances, the Court in *Radio Officers* (347 U.S. at 45, n. 53) cited *National Labor Relations Board v. Industrial Cotton Mills*, 208 F. 2d 87 (C.A. 4), certiorari denied, 347 U.S. 935; *Cusano v. National Labor Relations Board*, 190 F. 2d 898 (C.A. 3); *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 162 F. 2d 435 (C.A. 7); and *National Labor Relations Board v. Gluck Brewing Co.*, 144 F. 2d 817 (C.A. 8). *Industrial Cotton* and *Cusano* involved situations where employees who were in fact engaging in protected concerted activities were discharged by their employer under the honest, but mistaken, belief that they were engaging in misconduct which warranted their discharge; *Allis-Chalmers* involved a situation where, after a union had been selected for a bargaining unit consisting of rank-and-file employees and inspectors, the employer, allegedly motivated by the consideration that inclusion of inspectors in the same bargaining

There is no inconsistency between these decisions and the manifold expressions of courts and text writers²¹ asserting that the decisive question under Section 8(a)(3) is the "real motive" for the employer's conduct. The typical case under Section 8(a)(3) raises a question of fact, and the context makes it clear that the expressions were directed at this problem and spoke of the "real motive" as the reason or underlying basis for the employer's action against the alleged victim of unfair discrimination. Thus the "real motive" is, and should be, decisive when the question to be decided is whether the employer has engaged in improper discrimination—that is to say, whether the employer discharged or took other action against an employee because of union membership or

unit would have an adverse effect on production, reclassified the inspectors' jobs and limited their functions; and *Gluek Brewing* involved a situation where the employer, motivated by a desire to avoid a disruption and loss of business threatened by the Teamsters, discharged his own drivers represented by the Brewers and subcontracted out the trucking operation to a company represented by the Teamsters (see *infra*, pp. 35-36). In all of these cases, since union membership or activity was the basis for the discrimination, the Board's finding that the employer had discriminated in violation of Section 8(a)(3) was sustained, notwithstanding the employer's "good" motive.

²¹ See, e.g., *Radio Officers v. National Labor Relations Board*, 347 U.S. 17, 43; *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 132; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46; *National Labor Relations Board v. Electric City Dyeing Co.*, 178 F. 2d 980, 982 (C.A. 3); *National Labor Relations Board v. Blue Bell-Globe Mfg. Co.*, 120 F. 2d 974, 975 (C.A. 4); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 20; Millis & Brown, *From the Wagner Act to Taft Hartley*, pp. 428-429 (1950).

activity, or "for any reason other than union activity or agitation for collective bargaining with employees" (*Associated Press v. National Labor Relations Board*, 301 U.S. 103, 132). If union membership or activity is the basis, Section 8(a)(3) is violated. If the only basis for the discrimination is lawful—if the employer "discriminates" against employees who are guilty of insubordination or absenteeism, for example—any effect of the discharge upon union membership is irrelevant because the discrimination is not of the kind prohibited by the Act.

Teamsters Local 357 v. National Labor Relations Board, 365 U.S. 667, further illustrates the principle that the "true purpose" or "real motive" for the employer's action is relevant only in determining whether there has been, or will be, discrimination of a kind that violates Section 8(a)(3). The Board had held that a labor organization unlawfully attempted to cause an employer to violate Section 8(a)(3) by causing him to promise to hire all his employees through a union hiring hall at which it promised to engage in no discrimination because of the presence or absence of union membership. In setting aside the Board's order, this Court held that "discrimination cannot be inferred from the face of the instrument" (pp. 675-676) and concluded—

It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. * * * But, as we said in *Radio Officers v. Labor Board, supra*, the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination."

In the instant case, the fact of discrimination is acknowledged. The "motive," in the sense of the subjective basis for the discrimination, being plain upon the face of the superseniority plan, is undisputed. The employer deliberately classified employees according to their continued exercise of the right to engage in concerted activities protected by the Act, favoring those who did not strike any longer and penalizing those who continued to exercise the right to strike. The "intent" to engage continuously in this discrimination is manifest, for the promise of superseniority ran from the time of the announcement during the strike into the indefinite future. Nor can respondent hope to deny that the natural and probable consequence of this discrimination on the basis of participation in concerted activities would be to discourage union membership.

Respondent's real defense is that the intentional discrimination against employees who continued to engage in this union activity, with its consequent discouragement to union membership, is justified by the ultimate objective of resuming business operations in the face of the strike. So far as we are aware no court has ever held, except in dealing with such a superseniority program, that discrimination on the basis of union membership or protected concerted activities can be excused by proof that it will serve the employer's business.²² The contrary rule was laid

²² In *Pittsburgh-Des Moines Steel Company v. National Labor Relations Board*, 284 F. 2d 74 (C.A. 9), the court held that a bonus based on productivity did not violate Section 8(a)(3) notwithstanding that it "penalized" employees who had been

down as early as *National Labor Relations Board v. Star Publishing Co.*, 97 F. 2d 465 (C.A. 9, 1938). In that case a Teamsters Union threatened to tie up the employer's business by a strike unless the employer required 20 employees to give up their membership in the Newspaper Guild. When the 20 employees refused but were unable to give the employer assurance that the papers would be delivered despite the threatened Teamsters' strike, the employer removed them from their usual positions and substituted members of the Teamsters Union. The Ninth Circuit held that the discrimination violated Section 8(a)(3) and rejected the defense that it was necessary to make the transfer because the business would otherwise be disrupted and therefore, under all the facts, the transfer was excusable. See 97 F. 2d at 470. The rule laid down there has been followed in numerous cases. *Wilson & Co., Inc. v. National Labor Relations Board*, 123 F. 2d 411, 417-418 (C.A. 8); *National Labor Relations Board v. Pittsburgh Plate Glass Company*, 123 F. 2d 411, 417-418 (C.A. 8).

on strike, for time spent on strike was counted as "non-productive." Assuming *arguendo* the correctness of this holding, the situation here is distinguishable. In *Pittsburgh*, strike activity was not itself the basis for denying the bonus, and in any particular period it was fortuitous whether it or some other factor would be the cause of the drop in productivity. Here, on the other hand, strike activity was the sole, and, indeed, the intended (see *supra*, pp. 15-16), basis for determining which employees would receive the seniority advantage and which would not. Moreover, in *Pittsburgh* the disadvantage incurred by the strikers was not unusually harsh, for strikers are not entitled to draw pay while on strike and the denial of a bonus because of lack of production during a strike is not too dissimilar. A grant of superseniority, on the other hand, visits an extreme and unusual penalty on the strikers (see *supra*, p. 22), and its effects last far beyond the particular strike.

tions Board v. Hudson Motor Car Co., 128 F. 2d 528, 532-533 (C.A. 6); *Idaho Potato Growers v. National Labor Relations Board*, 144 F. 2d 295, 302-303 (C.A. 9), certiorari denied, 323 U.S. 769; *National Labor Relations Board v. Gluck Brewing Co.*, 144 F. 2d 847, 853 (C.A. 8); *Cusano v. National Labor Relations Board*, 190 F. 2d 898, 901-902 (C.A. 3); *Collins Baking Company v. National Labor Relations Board*, 193 F. 2d 483, 485-487 (C.A. 5); *National Labor Relations Board v. Oertel Brewing Co.*, 197 F. 2d 59, 61 (C.A. 6); *National Labor Relations Board v. McCatron*, 216 F. 2d 212, 215 (C.A. 9), certiorari denied, 348 U.S. 943; *National Labor Relations Board v. Richards*, 265 F. 2d 855, 860 (C.A. 3).

Thus, proof of discrimination on the basis of union membership or protected concerted activities, the natural and probable consequence of which is to encourage or discourage union membership, makes out both elements of a violation of Section 8(a)(3); and the unfair labor practice which Congress has forbidden cannot be excused on the ground that the infraction would better serve the employer's business interest.

This conclusion is consistent with *National Labor Relations Board v. Mackay Radio and Tel. Co.*, 304 U.S. 333. In *Mackay*, the Court held only that an employer may continue to run its business despite a strike and may therefore hire employees to fill the vacancies without being required to discharge the new employees at the end of the strike in order to make work available for strikers who wish to return to their positions. Such conduct, unlike respondent's, does not involve adopting a permanently discrimina-

tory classification upon the basis of strike activities. Since an employer is always privileged, in the absence of contractual obligations, to fill the places of employees who are absent from work for a substantial period, it can hardly be said that those returning strikers for whom no work is available because replacements are on the job are the victims of discrimination based upon their exercise of the right to strike. They have no jobs only because no work is available. To hold otherwise would prefer strikers to replacements. The only victims of discrimination in the *Mackay* case were the strikers whom the employer refused to put back to work because of their union activity. The Court held (304 U.S. 347) this discrimination to violate the Act without inquiring into whether the employer thought that the discrimination would assist him in operating a successful business. In the present controversy, therefore, when the Board found that the employer had in fact engaged in discrimination in favor of those who refrained from further strike activities and against those who continued to exercise their rights under Section 7, with the natural and probable consequence of discouraging union membership, all the facts essential to make out a violation of Section 8(a)(3) had been established and the employer's ultimate purpose became irrelevant.

Insofar as the opinion of Justices Harlan and Stewart in *Teamsters Local 357 v. National Labor Relations Board*, *supra*, suggests that an employer's ultimate business purpose may justify discrimination based upon union membership or activities protected

B

by Section 7, the probable consequence of which is to encourage or discourage union membership, it is, in our view, contrary to the words of Section 8(a)(3), to the decisions of this Court, and to a long line of administrative and judicial precedents. Even if their view were to be accepted, however, it would not lead to affirmance of the decision below. The opinion of Justices Harlan and Stewart recognizes that not every business purpose assigned by an employer is sufficient to justify discrimination against employees based upon their union membership or protected activities. See 365 U.S. at 680-682. We have already shown that, if there is room for balancing the conflicting interests of the employer in operating the business and of the employees in freedom to engage in concerted activities without reprisal, the justification asserted by the employer in this case is insufficient to excuse the major interference with rights protected by the Act. See pp. 21-26, *supra*.

CONCLUSION

The judgment should be reversed and the cause remanded with instructions to enter a decree enforcing the order of the Board.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MARION L. GRIFFIN,
Attorney,

National Labor Relations Board.

DECEMBER 1962.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right

may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions gen-

erally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Office Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 288

NATIONAL LABOR RELATIONS BOARD.

Petitioner

v.

ERIE RESISTOR CORPORATION and
INTERNATIONAL UNION OF ELECTRICAL, RADIO
AND MACHINE WORKERS, LOCAL 613,
AFL-CIO

On Writ of Certiorari to the United States Court of
Appeals for the Third Circuit

BRIEF ON BEHALF OF ERIE RESISTOR CORPORATION, RESPONDENT

JOHN C. BANE, JR.

JOE N G. WAYMAN

REED SMITH SHAW & McCCLAY

747 Union Trust Building
Pittsburgh, Pennsylvania

Counsel for Erie Resistor
Corporation

Of Counsel:

IRVING OLDS MURPHY

GIFFORD, GRAHAM, MACDONALD & ILLIG

615 Masonic Building
Erie, Pennsylvania

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AFL-CIO

On Writ of Certiorari to the United States Court of
Appeals for the Third Circuit

**BRIEF ON BEHALF OF ERIE RESISTOR
CORPORATION, RESPONDENT**

STATUTE INVOLVED

In addition to the provisions of the *National Labor Relations Act*, as amended (61 Stat. 136, 29 U.S.C. 151, et seq.), set forth in the Appendix to the Board's Brief, the provisions of Sections 10(c) and 10(e) of the Act are set forth in the Appendix hereto, *infra*, pp. 57-60.

Counter-Statement of Question Presented.

**COUNTER-STATEMENT OF QUESTION
PRESENTED**

Did the Board properly hold that every grant of job tenure by means of additional seniority to permanent replacements for economic strikers is *per se* a violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, and so, did it properly refuse to consider or pass upon the findings of the Trial Examiner, fully supported by the record, that the employer had no unlawful discriminatory purpose whatsoever; that the employer's sole purpose was lawful; that the additional seniority policy was adopted due to compelling economic necessity; and that the employer complied in every respect with the law?

*Counter-Statement of the Case.***COUNTER-STATEMENT OF THE CASE****A. The Facts**

Erie Resistor Corporation is a relatively small company having its principal office in Erie, Pennsylvania, where it also has a manufacturing plant. (R. 68a). At the material times it was engaged in the highly competitive business of manufacturing electronic components and molded plastic parts. Competition, including Japanese imports, was so severe that the Company could not interrupt deliveries without severe and permanent loss of its markets. (R. 38a-39a, 419a-422a, 425a, 427a-429a, 449a-451a).

The Company had dealt amicably with the International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO, for many years, and entered into numerous written labor agreements with that Union. (R. 58a-59a, 71a-73a).

In January, 1959, at the Union's request, the Company entered into negotiations for a new contract to replace the one due to expire March 31, 1959. (R. 73a). Some twenty-one negotiating meetings were held up to March 31, 1959, and many issues were resolved, but not all of them. (R. 37a-39a, 74a-76a, 291a-296a, 233a-235a).

On March 31, 1959 the Union went on strike in support of its demands, which then included a general wage increase, limitation on subcontracting, freezing seniority for certain job incumbents, improved vacations, and assumption by the Company of certain group insurance costs. The strike was conceded to be an economic strike. (R. 3a, 37a-38a, 297a-308a, 278a-279a, 82a-84a).

Counter-Statement of the Case.

On March 31, there were about 478 bargaining unit employees at work. There were about 450 bargaining unit employees on layoff. The laid off employees had seniority, but due to the depressed state of the business they had no prospect of being recalled to work. (R. 36a, 69a-70a).

The Company operated the plant throughout the strike because it had to in order to survive. (R. 38a-39a, 419a-422a, 425a, 427a-429a, 449a-451a).

All during April the Company tried to operate using salaried personnel, clerks, engineers, managers and all other non-bargaining unit personnel. Production amounted to only 15% to 30% of that required to continue in existence. (R. 4a, 39a, 429a-430a, 409a-410a, 417a).

The biggest electronic component customer cancelled all its orders, the biggest plastics customer removed its dies and tools, and intense pressure was put on the Company by its remaining customers to resume normal deliveries. (R. 425a, 450a-451a).

Beginning April 2 the Union engaged in mass picketing and violence in an attempt to keep everyone out of the plant. This continued throughout the strike in spite of a state court injunction and ultimately resulted in conviction of the local Union president for contempt. (R. 453a, 370a-372a, 470a, 485a).

By May 3 the Company concluded it would have to hire replacements for the strikers in order to survive. By a letter dated May 3 it notified all employees of its intent to hire permanent replacements beginning May 7. (R. 4a, 39a-40a, 320a, 431a-432a; G.C. Ex. 7, R. 560a-561a).

Counter-Statement of the Case.

On May 7 and 8 the Union engaged in mass picketing and violence so extensive that on one day the police closed the plant and no one could get in. These riots received prominent headlines in the only newspaper in Erie. (R. 40a, 364a-365a, 453a).

On May 11 the Company began to hire replacements. When they were hired they were told they would not be laid off or discharged at the end of the strike. This assurance was repeated when they actually came on the job. Nevertheless, many who were hired failed to report for work. (R. 4a, 40a-41a, 369a-397a, 366a, 146a-147a, 227a, 416a, 435a, 443a-444a, 343a-344a; G.C. Ex. 25, R. 574a; G.C. Ex. 26, R. 576a).

Beginning with the hiring of the first replacement on May 11, the Company, which had never ceased to meet in an attempt to settle the issues in dispute, placed on the bargaining table the problem posed by hiring of permanent replacements in the peculiar circumstances of this case.

On May 11, the day the first replacement was hired, the Company told the Union that in view of the layoff list of some 450 that already existed on March 31, when the strike began, some method would have to be worked out to enable the Company to keep its promise to the replacements that they would not lose their jobs after the strike ended. Since the Company was offering a contract with seniority, the Company suggested some form of seniority arrangement for replacements, but always offered to consider any solution to which the Union would agree. (R. 4a, 311a-312a, 226a-227a, 441a-443a, 425a, 146a-147a, 120a).

Counter-Statement of the Case.

The Union, however, absolutely refused to bargain on the subject, taking the adamant stand that all replacements must be discharged and all strikers rehired, including five who had been discharged for violence and misconduct on the picket line. The Union maintained this position throughout the strike, up to and including the last day. (R. 311a-314a, 179a-180a, 222a-224a).

After reviewing the problem of getting sufficient production to preserve the plant, the meager numbers of replacements willing to brave the picket line, and the Union's flat refusal to consider or even discuss any arrangement that would result in the replacements staying on after the strike ended, the Company officials concluded that they had no choice but to develop some plan themselves. (R. 41a, 5a, 120a-122a, 343a-345a, 454a, 441a-443a, 433a-435a, 459a).

A few days before May 27, after studying the prospects of future business and the number of people on layoff, but who had seniority, the Company concluded that twenty years' seniority would be needed for anyone to have reasonable assurance of working after the strike. It therefore wrote up a program on May 27 spelling out its policy of replacing the strikers having least seniority first, and also a policy of adding twenty years to the seniority of the replacements. (R. 343a-345a, 433a-435a, 454a-456a, 120a-122a).

The Company did not immediately put the policy in effect, nor did it announce it to the public or the employees, but explained it to the Union at the negotiating meeting of May 28, while still seeking some agreement on any alternative that would permit the replacements to continue on after the strike. The Union still refused to

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consider any arrangement under which the replacements could be retained. (R. 41a, 344a, 119a-120a, 117a-118a, 452a).

The Company did *not* announce on May 28 that its proposition to add twenty years to the seniority of replacements would go into effect. This was only one of the many proposals made to the Union in an effort to solve the problem. (R. 41a, 343a-345a, 119a-122a, 433a, 435a, 452a-456a).

However, the Union without authorization and presumably for its own purposes had widely publicized the so-called "20-year proposal" on radio and television on May 30 and 31. (R. 6a, 41a, 173a).

It was only after many more bargaining meetings, in which the Union adamantly refused to consider any arrangement that would allow the replacements to continue to work after the strike, that the Company, on June 10, publicly announced the reasons and need for a job assurance plan, and on June 15 posted a bulletin announcing it was thenceforth in effect. (R. 6a, 42a, 122a-124a, 436a, 452a; G.C. Ex. 6, R. 556a-559a).

After the Union broadcast the Company proposal of May 28, more replacements came to work, and the number steadily increased from then on, until by June 22 or 23 there were about 450 employees working in the plant, which was virtually a full complement. Of course, of these some 140 were clerks, managers, engineers and the like, and 58 were college students who were hired as temporary replacements during the summer vacation that began around June 1. (Resp. Ex. 12, R. 522a).

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On June 24 the Union sent the Company a telegram announcing that the strike was over, and after some brief misunderstanding, the strike ended on June 25, although no contract was signed at that time. (R. 7a, 43a, 166a, 214a-215a; G.C. Ex. 14, R. 567a; G.C. Ex. 15, R. 569a).

The 140 supervisors, clerks and engineers returned to their regular duties. The 58 college students were dismissed as promptly as strikers could be called in. All the permanent replacements continued to work, and all non-replaced strikers for whom there were jobs were called in, according to seniority, with certain minor agreed-upon exceptions. (R. 7a, 409a-410a, 411a-414a).

On July 17 the Company and the Union signed a new labor contract, and simultaneously executed a "strike settlement agreement." The strike settlement agreement settled the dispute as to the five employees who had been discharged for violence on the picket lines, leaving three discharged and reinstating two with a 30-day disciplinary layoff; provided that non-replaced strikers who were not yet called back would be considered as "bidders" for open jobs; and provided that the Company's replacement and job assurance policy—the so-called "superseniority"—would be resolved by the National Labor Relations Board and the Courts, and that it was to remain in effect pending final disposition of the matter. (R. 7a-8a, 44a, 166a, 168a-169a; G.C. Ex. 27, R. 578a).

Thereafter, plant operations increased to a high point of 442 bargaining unit employees in September, but then due to economic circumstances declined until there were only 240 in May, 1960. (R. 7a; Resp. Ex. 13, R. 523a).

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Beginning in October, numbers of employees were laid off, including some returned strikers and some replacements who had been granted the so-called "super-seniority." (R. 7a, 280a-282a).

The Trial Examiner found that the Company had a lawful economic purpose and need for its actions; that there was no refusal to bargain in good faith or any evidence of discriminatory motive or attitude; and recommended dismissal of the complaint. (R. 33a-64a).

He made the following findings of fact, among others:

"* * * there is no contention, much less evidence, that the Company was engaging in, or had engaged in, any other unfair labor practices at or about the time it announced and adopted the super-seniority policy." (R. 59a).

"* * * in the instant case there is a complete absence of the factors which the Board has relied upon as evidence of illegal employer motivation in the announcement and adoption of a superseniority policy. Nor do I find any other factors upon which a finding of illegal motivation might be predicated." (R. 59a).

"From the evidence and findings herein, I am convinced, and find, that the 20-year seniority policy of the Company was announced and adopted for legitimate economic reasons." (R. 64a).

*Counter-Statement of the Case.***B. The Board's Conclusions**

The Board on July 31, 1961, held notwithstanding the absence of any discriminatory motive or intent and the existence of lawful purpose and need, that the so-called superseniority for replacements was *per se* unlawful, and that the strike was converted from an economic strike to an unfair labor practice strike on May 29, when the Union had a meeting concerning the Company's proposal. (R. 3a-28a).

The Board refused to consider the evidence offered by the employer as to motive or as to the circumstances and need for what was done, and made no findings of fact on these points.¹ (R. 19a, n. 29).

C. The Decision of the Court of Appeals

Upon appeal, the United States Court of Appeals for the Third Circuit refused enforcement on the basis of the narrow question presented by the Board's decision, saying that preferential seniority is not *per se* unlawful, but that the Board is obliged to consider the record as a whole in determining whether there was a violation of Section 8(a)(3).² (Circuit Court Proceedings, pp. 15-21).

1. Under the circumstances, the only official findings before the Court are those of the Trial Examiner. His findings are part of the record and should not be ignored. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951); Cf. *N.L.R.B. v. James Thompson & Co.*, 208 F. 2d 743 (2nd Cir., 1953).

2. The alleged violation of Section 8(a)(3) was the only question before the Court. The Board had dismissed the minor, subsidiary 8(a)(5) refusal to bargain charges (R. 20a), and no independent violation of Section 8(a)(1) was alleged. (R. 81a-82a).

*Summary of Argument.***SUMMARY OF ARGUMENT**

I. The critical issue is whether or not the National Labor Relations Board may declare that an action not expressly forbidden by the terms of the National Labor Relations Act is *per se* a violation of Sections 8(a)(1) and (3) of the Act. The particular action in question was adoption of a policy of job tenure by means of additional seniority for permanent replacements of economic strikers. The Board selected this respondent and this case as the vehicle for establishment of this *per se* doctrine, finding the respondent guilty of no unfair labor practice, no unlawful motive, and no wrongdoing of any kind absent the *per se* illegality of every policy of additional seniority, which the Board in its sweeping general prohibition calls "superseniority." Consistent with this doctrine, the Board refused to consider any defense of any nature whatsoever.

II. Having outlawed all additional seniority by this means, the Board seeks to justify this administrative legislation in a series of arguments heretofore advanced in other cases and rejected by the courts. The Board argues that adoption of a policy of additional seniority foreseeably interferes with the protected activity of striking, and discourages union activity. However, it is clear that even if this be true, this does not of itself render the policy unlawful. Operating a plant during a strike or permanently replacing economic strikers necessarily interferes with the strike, yet the Board concedes that these acts are lawful, and this is well established law. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). The Board then argues that in declaring all "supersen-

Summary of Argument.

iority" unlawful it is merely carrying out its function of balancing conflicting interests. A sweeping declaration that all acts of a certain type are absolutely unlawful, in the absence of an express prohibition in the Act, is not balancing of interests, but legislation. Assuming arguendo that the Board may balance conflicting interests by taking into account the facts and circumstances in each case; nevertheless if an entire class of conduct is to be outlawed, that balancing is for Congress. *National Labor Relations Board v. Truck Drivers, Local 449*, 353 U.S. 87 (1957); *National Labor Relations Board v. Insurance Agents International Union*, 361 U.S. 477 (1960). No broad rule outlawing this class of conduct is required. The principles announced by five Courts of Appeal narrowly circumscribe the use of "superseniority", and enable the Board to fully protect the legitimate interests of all concerned.

III. No principle is more firmly established than that which recognizes that the purpose or motive of the employer is of critical importance in every case involving an alleged violation of Section 8(a)(3). *Radio Officers Union v. National Labor Relations Board*, 347 U.S. 17 (1954). The Board's assertion that purpose or motive is irrelevant is necessary to its *per se* doctrine, but it is contrary to the law. While no one disputes the Board's right to draw inferences, any such inference must be based upon evidence, not upon another inference, nor does the right to draw inferences permit the Board to refuse to consider evidentiary facts rebutting its inference. In this case the Board drew no inference of unlawful motive, as it now attempts to do in its brief, but if it had, that inference must still depend entirely on its predetermination that all "superseniority" is *per se* unlawful.

Summary of Argument.

The evidence shows and the Trial Examiner found that the policy of additional seniority in this case was adopted solely for a lawful, non-discriminatory purpose. The Board abused its functions when it refused to consider the facts and the Trial Examiner's findings. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951).

IV. If Erie Resistor is to be judged on the facts in its own case, and not required to defend superseniority as a generally necessary or praiseworthy institution, it is clear that what the respondent did here was exactly what the law permitted it to do, and no more. The strike was an economic strike. Respondent was guilty of no unfair labor practice. It hired permanent replacements out of necessity to save the plant from complete destruction, not simply as a convenience or to avoid loss of profits. The only way it could get replacements was to assure them of job tenure, and because of the depressed business conditions and the already hopeless layoff list of people with seniority, the only way it could keep its lawful promise was to either give the replacements some form of additional seniority or agree on some other arrangement with the Union. The Union refused to consider any arrangement that would permit the replacements to remain. Thus in this case the policy of additional seniority for replacements was purely and simply the necessary implementation of the right to operate the plant during a strike and to hire permanent replacements, both of which are rights conceded by all to exist.

*Argument.***ARGUMENT****I.**

The sole question in this case is whether or not the Board properly declared what it calls "superseniority" per se unlawful.

The issue in this case is a narrow one. Simply stated, it is whether or not the act of granting additional seniority to replacements for economic strikers is *per se* a violation of Sections 8(a)(1) and 8(a)(3) of the Act.

Before the Court of Appeals the Board advanced the argument that under the decision in *Radio Officers Union v. National Labor Relations Board*, 347 U.S. 17 (1954) motive of the employer is irrelevant in a case involving the alleged violation of Section 8(a)(3).

The argument that the Board's decision was correct because it was simply balancing conflicting interests is advanced for the first time before the Supreme Court. The Board's opinion says nothing of balancing, nor does the Board's Brief in the Court of Appeals.

However, we shall deal with these arguments presently. Whether either or both be used, it is abundantly clear that the Board's decision was that additional seniority, which it calls "superseniority", is absolutely unlawful, and that the Board will consider no defense whatsoever in such a case.

The Board has been understandably reluctant to use the words *per se*. In the world of labor-management relations they have an alien ring, for, as experts must know, this is a world of shades of gray in which rarely, if ever, can any position be said to be all black or all white.

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Of course, no provision of the Act specifically prohibits the grant of additional seniority to replacements or anyone else.

When the Board decided to impose the prohibition, it selected Erie Resistor as its guinea pig. As we shall show, at the very moment Erie Resistor was being prosecuted for what the Board now describes as an obvious violation of the Act, other employers who did exactly the same thing were not even required to answer a complaint.

Erie Resistor, a small company trying to survive in a bitterly competitive field, had conscientiously lived up to the letter and spirit of the law as announced in the decisions of the courts. It had taken fearful punishment in a long strike, and had not recovered.

As a reward for conscientious observance of the law, this small plant was selected by the Board as the vehicle for establishment of the doctrine that the grant of any additional seniority to replacements of economic strikers is *per se* unlawful, and that no defense, however meritorious; no circumstances, however compelling; no decent and honorable behavior; no compliance with legal and moral obligations, however solidly proven; and no provocation or violation by the other party of legal and human rights, however flagrant, would even be considered by the Board.

This selection was deliberate. At the very outset of the hearing, Counsel for the General Counsel said:

"Paragraph 9 of the Complaint alleges the promulgation of a seniority policy which deprived employees of their seniority status.

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"The Trial Examiner may note that the motivation for this seniority policy is not alleged in Paragraph 9. The reason is that this paragraph is directed towards what is referred to as the per se superseniority docket, (sic) Potlatch Forest, an early Board case.

"I might add this allegation of the complaint is included specifically at the direction of the General Counsel which wants to bring this doctrine before the National Labor Relations Board for review. It is the only case in which the per se doctrine has been exposed to a ruling." (R. 80a).

At the very time³ Erie Resistor was being tried on the theory that superseniority for replacements was *per se* illegal, the General Counsel issued a ruling in Case No. SR-509 on identical facts as follows:

"The General Counsel concluded that further proceedings were unwarranted. The evidence, when viewed in its entirety, supported the finding that the company had promised the replacements superseniority in order to staff its plant during the strike, rather than as a retaliatory measure to punish the strikers. In these particular circumstances, insufficient basis was deemed to exist for a finding that the company's conduct in this respect or its action in reinstating only those strikers who had not been permanently replaced prior to their unconditional offer to return to work, constitute unfair labor practices. *N.L.R.B. v. Mackay Radio & Telegraph Company*, 304 U.S. 333, 345-6; cf. *Mathieson Chemical Corporation*, 114 N.L.R.B. 486, 487."

3. The Complaint against Erie Resistor was issued April 7, 1960. SR-509 was released on June 27, 1960.

Argument.

Perhaps under the law the Board is permitted to select victims when it wants to change its rules or establish some extreme principle. Perhaps labor cases can be treated as though they were some sort of laboratory experiment or some academic subject for philosophical discussion.

However, the very existence of this small plant is threatened by the enormous amount of money demanded by the Board as the price for establishing its *per se* rule. This plant is owned and managed by human beings, and it employs human beings, both replacements and former strikers, whose livelihood is threatened, not guinea pigs.

If they are to be condemned without a chance to have their defense given consideration, it should not be on the pretext that this is not a *per se* doctrine.

The complaint was issued on the *per se* theory. All other issues were eliminated after the hearing, the Trial Examiner's findings and report, and the Board's decision. The Trial Examiner, following the decisions of the courts, rejected the *per se* theory. The Board reversed the Trial Examiner and adopted the *per se* doctrine. The Court of Appeals reversed, rejecting the *per se* theory.

This was the only issue before the Court of Appeals, and it is the only issue before the Supreme Court.

*Argument.***II.**

The Board erred in declaring that a preferential seniority plan for replacements is *per se* unlawful.

The issue before the Circuit Court was whether or not any and every grant of additional seniority to economic strikers is *per se* unlawful, regardless of its extent, purpose, or surrounding circumstances.

Thus the question is not whether under the facts of this case—facts which the Board admits it ignored—adoption of a policy of additional seniority violated Sections 8(a) (1) and 8(a) (3), but whether under any conceivable set of facts an employer can grant additional seniority to replacements without violating the law.

The Court of Appeals properly refused to endorse such extreme administrative legislation.

(a) *The fact that some action by an employer or union foreseeably or inevitably interferes with some protected activity or encourages or discourages union activity does not of itself render it unlawful.*

One of the basic principles of the federal law governing labor relations is that an employer may operate his plant while his employees are on strike, whether it be an economic strike or an unfair labor practice strike.

This is not and has not been disputed by anyone, even though the Act does not grant this right specifically.

A second and equally basic principle is that, absent unfair labor practices, an employer may hire permanent replacements for economic strikers. As is true of the

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right to operate during a strike, this right, or "privilege" as the Board calls it, is not specifically granted in the Act. The existence of this right was recognized in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). There the Court said:

"* * * Nor was it an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although Section 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. * * *"

This right to hire and retain replacements has been recognized by the Board, the Courts, and Congress from the day it was announced. The Board concedes that the right exists. (R. 11a-12a).

Nevertheless, operation of the plant during a strike certainly interferes with the effectiveness of the strike. It certainly discourages union membership and activity.

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If, as frequently happens, some employees join in the strike and some do not, the union is divided into two camps, and even though the employer knows or must foresee that by permitting employees to work while others are striking he is discouraging union activity or membership, no one has ever claimed that he must discharge or lay off those employees who want to work.

In this very case the Board found no unfair labor practice until May 29, yet prior to that date the employer operated his plant by using 140 clerks, supervisors and engineers, 33 replacements and four former strikers. (R. 4a-5a). Thus the Board in this case has held that the fact that the action by the employer interfered with the effectiveness of the strike or discouraged union activity or membership does not of itself render it unlawful.

It is equally plain that permanently replacing economic strikers inherently interferes with the effectiveness of a strike and discourages union activity. If, as sometimes happens, all the strikers are permanently replaced, not only is the strike broken, but the union, so far as that plant is concerned, is destroyed.

Nevertheless, in this case, as in hundreds of others, the Board recognized that this did not of itself render the hiring of replacements unlawful, for it found no unfair labor practice prior to May 29, although prior to that time it found that 33 permanent replacements had been hired and were working. (R. 5a).

The Board's own decision in the very case at bar refutes its major premise.

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- (b) *The Board's function of balancing conflicting interests does not extend to writing into the act prohibitions that it does not already contain.*

Authority for absolute proscription of the granting of additional seniority is claimed to exist because this Court has said that the Board may balance conflicting economic interests. *National Labor Relations Board v. Truck Drivers, Local No. 449*, 353 U.S. 87 (1957).

That case involved a lockout by the non-struck employers of an employers' association, and was but one of a great number of cases involving charges that lockouts were violations of Sections 8(a)(1) and 8(a)(3).

In this connection, it should first be noted that a lockout foreseeably and inherently interferes with the right to strike, and most assuredly discourages union membership and activity. If the Board's theory were correct, it would follow that the Board and the Courts would have declared all lockouts illegal *per se*, but this is not the case.

On the contrary, as Mr. Justice Brennan said in the case upon which the Board relies:

"Although *** * there is no express provision in the law either prohibiting or authorizing the lockout, the Act does not make the lockout unlawful *per se*. ***"

This is most certainly not authority for the proposition that the Board could hold that all lockouts are *per se* unlawful.

The "balancing" spoken of in that case refers neither to absolute prohibition of lockouts nor to their

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absolute authorization. Instead it approves the Board's practice of examining the facts in each such case, and where economic hardship is shown⁴ or where substantial practical collective bargaining problems are involved, of making its decision on the facts found in that case.

As Mr. Justice Brennan put it:

"The Court of Appeals recognized that *the National Labor Relations Board has legitimately balanced conflicting interests by permitting lockouts where economic hardship was shown*. The court erred, however, in too narrowly confining the exercise of Board discretion to the cases of economic hardship. We hold that *in the circumstances of this case* the Board correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action was lawful." (Emphasis Supplied)

The Board's refusal, in cases involving job assurance or additional seniority, to recognize the possibility that in some case economic hardship or need might justify a grant of additional seniority,⁵ or that in some

4. See, e.g., *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268; *International Shoe Co.*, 93 N.L.R.B. 907; *Duluth Bottling Association*, 48 N.L.R.B. 1335.

5. The Board's proposition is based upon the assumption that motive is irrelevant in such cases. (Board's Brief, p. 19). Thus where motive is relevant, and as we claim, of controlling importance, there is no authority for "balancing" conflicting interests case by case or any other way.

We have never conceded any intent to discriminate, but have proved instead that the employer's sole purpose was lawful and non-discriminatory.

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case the realities of collective bargaining in a particular situation might require such action, is not balancing. It is legislation by the Board.

We have not sought, and we do not seek, a ruling that a grant of additional seniority to replacements is absolutely privileged, nor did the Court of Appeals make such a decision.

We do claim that the Board abuses its powers, and in effect abdicates its responsibility, when it outlaws an entire course of conduct without examining the facts and balancing the interests, if necessary, in each case.

This tendency to short-cut decisions is precisely what resulted in reversal of the Board's decision in *National Labor Relations Board v. Insurance Agents International Union*, 361 U.S. 477 (1960). Speaking for the Court, Mr. Justice Brennan said:

"Thus the Board's view is that irrespective of the union's good faith in conferring with the employer at the bargaining table for the purpose and with the desire of reaching agreement on contract terms, its tactics during the course of the negotiations constituted *per se* a violation of §8(b) (3).

* * *

* * * * *

"The use of economic pressure, as we have indicated, is of itself not at all inconsistent with the duty of bargaining in good faith. But in three cases in recent years, the Board has assumed the power to label particular union economic weapons inconsistent with that duty. See the *Personal Products* case, *supra*, 108 N.L.R.B. 743, set aside, 97 U.S. App. D.C. 35, 227 F. 2d 409; the *Boone County* case,

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United Mine Workers, 117 N.L.R.B. 1095, set aside,
103 U.S. App. D.C. 209, 257 F. 2d 211; * * *

* * * * *

"It is one thing to say that the Board has been afforded flexibility to determine, for example, whether an employer's disciplinary action taken against specific workers is permissible or not, or whether a party's conduct at the bargaining table evidences a real desire to come into agreement. The statute in such areas clearly poses the problem to the Board for its solution. Cf. *Labor Board v. Truck Drivers' Union*, 353 U.S. 87. And, specifically we do not mean to question in any way the Board's powers to determine the latter question, *drawing inferences from the conduct of the parties as a whole*. It is quite another matter, however, to say that the Board has been afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful. * * *" (Emphasis Supplied)

The nature of the action taken by the respondent in that case was also said by the Board to justify the Board's *per se* rule, but, as the Court said:

"It may be that the tactics used here justify condemnation, but this would not justify attempting to pour that condemnation into a vessel not designed to hold it."⁶

6. The Court quoted a concise statement by Archibald Cox, found in 71 *Harvard Law Review* 1401, 1437: "To say 'there ought to be a law against it' does not demonstrate the propriety of the NLRB's imposing the prohibition."

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The argument that these tactics gave one party an undue advantage in bargaining was disposed of by the Court in the following statement:

"* * * Surely it cannot be said that the only economic weapons consistent with good-faith bargaining are those which minimize the pressure on the other party or maximize the disadvantage to the party using them. The catalog of union and employer weapons that might thus fall under ban would be most extensive."

In a separate opinion written by Mr. Justice Frankfurter, the following pertinent comment appears:

"The Board urges that this Court has approved its enforcement of § 8(b) (3) by the outlawry of conduct *per se*, and without regard to ascertainment of a state of mind. It relies upon four cases: *H. J. Heinz Co. v. Labor Board*, 311 U.S. 514; *Labor Board v. Compton-Highland Mills*, 337 U.S. 217; *Labor Board v. F. W. Woolworth Co.*, 352 U.S. 938; and *Labor Board v. Borg-Warner Corp.*, 356 U.S. 342.

* * * * To the extent that in any of these cases language referred to a *per se* proscription of conduct it was in relation to facts strongly indicating a lack of a sincere desire to reach agreement." (Emphasis Supplied)

More recently, in *Teamsters Local 357 v. National Labor Relations Board*, 365 U.S. 667 (1961), Mr. Justice Douglas, speaking for the Court in rejecting a *per se* rule observed:

"There being no express ban of hiring halls in any provisions of the Act, those who add one,

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whether it be the Board or the courts, engage in a legislative act."

Additional seniority, or as the Board calls it, super-seniority, is not expressly banned by the Act. When, as here, the Board imposes an absolute prohibition, it is clearly engaging in a legislative act.

(c) *Under existing decisions of the courts of appeal the Board needs no per se rule to amply protect the legitimate interests of all concerned.*

The Board urges, in effect, that unless it is permitted to adopt this *per se* doctrine it will be powerless to protect the rights of employees under Sections 7 and 13 of the Act.

Nothing could be further from the truth. In the cases in which the Board exercised its fact finding and discretionary powers, considering the whole record, its orders were enforced.

Only when the Board relied upon its *per se* doctrine was enforcement refused. The first such case was *National Labor Relations Board v. Potlatch Forests, Inc.*, 189 F.2d 82 (9th Cir., 1951).

In the cases that followed the Board did not attempt to apply the *per se* theory, but investigated all the circumstances to discover whether the genuine or true purpose of the employer was to protect and preserve his business or simply to punish employees for striking.

In *N.L.R.B. v. California Date Growers Ass'n.*, 259 F.2d 587 (1958), the Court of Appeals for the Ninth

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Circuit reviewed a decision of the Board that an employer was guilty of an unfair labor practice when he granted non-striking employees and replacements additional seniority. The Board's decision was based on its finding of fact that this additional seniority was not granted, or even decided upon, during the strike, was not communicated to personnel until long after the strike had ended, and thus was designed to punish the strikers, not preserve the business.

The Court said:

"Respondent contends, however, that it was not a violation of the Act for it to replace the strikers with new employees in order to continue its business during the strike, *N.L.R.B. v Mackay Radio and Telegraph Co.*, 304 U.S. 333; further, that it was proper to give those employees hired during the strike an assurance that their employment would not be terminated by the return of the strikers and hence, a layoff and hiring policy designed to implement these assurances was proper and not unfair labor practice. *N.L.R.B. v. Potlatch Forests*, 189 F. 2d 82.

"*Mackay Radio, supra* and *Potlatch, supra*, indicate that without doubt the actions taken by Respondent in the instant case do not constitute unfair labor practices in and of themselves. Such actions in particular situations may be perfectly permissible within the Act. The motive of the employer in carrying out these actions becomes the controlling factor. *Olin Mathieson v. N.L.R.B.*, *supra*; *N.L.R.B. v. Potlatch, supra*; *Labor Board v. Jones*

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& Laughlin, 301 U.S. 1, 45-46." (Emphasis Supplied)

In 1960 the same Court refused enforcement of the Board's order in *Pittsburgh-Des Moines Steel Co. v. N.L.R.B.*, 284 F. 2d 74. That case did not involve so-called superseniority directly, but it did involve the charge that the respondent company had unlawfully discriminated against strikers by calculation of a bonus in a manner that eliminated payments to employees who had engaged in a strike while paying the bonus to employees who had not been on strike.

The Board in that case relied, as it does here, upon *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17 (1954) as authority for the proposition that because such a bonus calculation necessarily interfered with and discouraged strikes, and discriminated between employees on the basis of their participation in a strike, it was per se illegal.

The Court in rejecting this theory reaffirmed its statements in *Potlatch* and *California Date Growers*, saying:

"That protected union activity is the direct cause of a business condition upon which an employer actually predicates discrimination among his employees does not mean that the basis for discrimination is the protected union activity. An employer may hire permanent replacements for economic strikers even though the business condition—a lack of manpower—which impels the employer to act was directly caused by the strike. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). Discussion in *Olin Mathieson Chemical*

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Corp., v. N.L.R.B., 232 F. 2d 158 (4th Cir., 1956), affirmed per curiam, 352 U.S. 1020 (1957) and in *N.L.R.B. v. California Date Growers Association*, 259 F. 2d 587 (9th Cir., 1958), indicates that when in order to obtain replacements for economic strikers it is necessary for an employer to promise seniority to the replacements, the denial of seniority status to those strikers who are reinstated is not an unfair labor practice, although the business condition which actuated the employer to deny seniority status to reinstated strikers was directly caused by the strike itself. * * *

In 1956, the Court of Appeals for the Fourth Circuit decided *Olin Mathieson Chemical Corporation v. N.L.R.B.*, 232 F. 2d 158. As the Ninth Circuit Court observed, this case involved a grant of so-called super-seniority to non-strikers after the strike was over. Circuit Judge Dobie, in discussing the grant of "super-seniority," said:

"* * * With a strike in progress, the primary concern of the employer is to keep his plant in operation. It is then proper for an employer, who might be unable to procure replacements save upon a promise of permanent tenure, to promise such tenure, to the replacements."

The key to the Court's reasoning is found in the following statement of facts:

"* * * The strike was over, the strikers had returned to work. The Olin plant was in full operation. No promise, when they were employed, was made to the employees who remained at work during the strike, or who had returned to work before the

Argument.

end of the strike, that their employment would be permanent. Olin, *after the strike, when there was no necessity for such action to keep its plants in operation*, promulgated its superseniority policy in favor of the so-called 'loyal employees' and against those who returned to work after the strike had failed and was over. Olin was clearly penalizing the strikers for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future. * * * (Emphasis Supplied)

The decision was affirmed by the Supreme Court *per curiam*, at 352 U.S. 1020 (1957).

In 1960 the Court of Appeals for the Sixth Circuit in a so-called superseniority case, *Ballas Egg Products v. N.L.R.B.*, 283 F. 2d 871, said:

"* * * the petitioner's motivation in adopting, maintaining and utilizing its superseniority policy was impelled by anti-union considerations rather than by any economic interest of its own; * * *

On this basis, and on the authority of *California Date Growers* and *Olin Mathieson*, the Court enforced the Board's order in a three-paragraph decision. The question of illegality of superseniority *per se* was not raised before the Board or the Court.

In December, 1960, the Court of Appeals for the Seventh Circuit handed down its decision in *N.L.R.B. v. Lewin-Mathes*, 285 F. 2d 329. Of course the Board would have it appear that superseniority was not considered by the Court (R. 10a, n. 13), but in the Court's resume of the facts, the following appears:

Argument.

"* * * the men (replacements) were granted superseniority over any of the strikers that would return. There were 7 men who reported for work as replacements. On June 6 a meeting was had between United (the striking Union) and Respondent. * * * They were advised that the replacements * * * had been granted superseniority. * * * The parties discussed a superseniority clause for the replacements. * * * Respondent insisted that United would have to represent the replacements and insisted further that there would have to be a clause providing for superseniority for the replacements. United stated that it could not negotiate a contract which recognized the replacements."

Later in the opinion, the following appears:

"The difficulty in the way of reaching an agreement between the parties was the insistence on the one hand of the Union to full jurisdiction and seniority rights within its unit and *the insistence of the Company* on the other of management rights with respect to assignment of work and, later, after the strike began, *its right to protect the replacements who had been hired during the strike by giving them the seniority and assurances which had been promised to them before they undertook to replace the strikers.* * * * " (Emphasis Supplied)

The Court rejected the Board's finding that the respondent had refused to bargain in good faith, and said in refusing enforcement:

"Having found that the strikers were not unfair labor practice strikers it would necessarily follow

Argument.

that the strikers were economic strikers in which case it would be lawful and proper to grant superseniority to replacements and we so hold." (Emphasis Supplied)

Thus, of the four Courts of Appeal which prior to *Erie Resistor* had occasion to pass upon superseniority for replacements, the Ninth Circuit Court on three separate occasions rejected the *per se* theory. The Fourth Circuit Court indicated clearly that it did not consider superseniority for replacements illegal *per se*. The Seventh Circuit Court specifically held that superseniority for replacements is lawful. The Sixth Circuit Court held, as did the Ninth and Fourth, that the controlling question that must be answered is whether superseniority for replacements was impelled by anti-union considerations rather than by the employer's own legitimate economic interest.

The Board argues that the recent decision of the Court of Appeals in *Swarco, Inc. v. National Labor Relations Board*, 303 F. 2d 668 (6th Cir., 1962), petition for certiorari pending, No. 335 October Term, 1962, is in conflict with the decision of the Court of Appeals in the instant case, but the opinion in that case indicates no approval of a *per se* theory.

As the Trial Examiner found, the additional seniority was granted by *Erie Resistor* because it had to hire replacements to survive, it could not get replacements without an assurance of tenure, and it could not make and keep such a promise without some form of seniority beyond the hiring date of the replacements or, alternatively, some other agreement with the Union that they could remain, which the Union refused.

Argument.

Erie Resistor's sole purpose was to get enough replacements to survive. It is true that any striker who chose voluntarily to return received the same treatment, but this was purely incidental, for as the Board observes: "This is doubtless due to the fact that, if any bargaining unit employees are willing to go to work during a strike, the employer, as a practical matter, cannot place them in a worse position than newly hired employees." (Board's Brief, p. 24, n. 15).

Swarco did not offer additional seniority to replacements at all, but used superseniority solely to induce strikers to abandon the strike. Whether this was or was not a violation of the law need not be decided here, for it is not the same case and the Board might well arrive at a different conclusion if it considered the facts of each case instead of relying upon a broad and absolute prohibition. Clearly the defense that it was necessary to obtain permanent replacements and to keep a lawful promise of tenure to them could not apply in Swarco.

Statements in Judge Cecil's opinion indicate that the Court would have reached a different conclusion had the respondent granted superseniority to replacements rather than restricting it to strikers who abandoned the strike. For example, he says (p. 671):

"The facts of this case do not bring it within the ambit of the *Mackay*⁷ case."

Then, a little later in the opinion, in discussing *N.L.R.B. v. Lewin-Mathes Co., supra*, he says (p. 672):

7. *N.L.R.B. v. Mackay Radio & Telegraph Co., supra.*

Argument.

"The court found that the strikers were economic strikers and that in such case it was lawful to grant superseniority to replacements. This is in accord with the rule announced in *N.L.R.B. v. Mackay Radio and Telegraph Co.*, 304 U.S. 333, at 345, 346.

* * * * *

"From a review of these cases involving superseniority, we find that the question of violation of section 8(a) (1) and (3) of the Act, by reason of granting superseniority, is a question of fact. *Each case must be decided on its own particular facts.*"
(Emphasis Supplied)

These statements are entirely inconsistent with the suggestion that the Court of Appeals was approving the *per se* doctrine. Instead, it seems clear that the Court was satisfied that where "superseniority" is granted to replacements for economic strikers, this is lawful under the rule in *Mackay Radio*.

Indeed the ruling of the Court of Appeals in *Lewin-Matthes*, if it be read literally, recognizes an absolute privilege to grant superseniority to such replacements.

This absolute privilege is the windmill against which the Board tilts in the instant case, but it is not the issue, for the Court of Appeals here did not so hold.

On the contrary, the Court of Appeals here recognized all the restrictions imposed by the statute and the precedents developed over the past years.

Argument.**III.**

The purpose or motive of the employer is of critical importance in every case involving an alleged violation of Section 8(a)(3).

The Board argues that under Sections 8(a)(1) and (3) of the National Labor Relations Act^s there are two types of cases. The first type is said to be cases involving "normal business conduct", such as granting wage increases, reducing wages, laying off an extra shift, or shutting down a plant. In such cases the Board admits motive is relevant. (Board's Brief, pp. 16-18).

For some reason, the Board avoids mentioning discharge of union adherents in its catalog of cases of this type, although they are perhaps the most prolific source of litigation under Section 8(a)(3). The established rule is that in such cases the Board has the burden of proving affirmatively and by substantial evidence that the employer's motive was to interfere with rights guaranteed by Section 7 and to discriminate because of membership or non-membership in the union. There is no inference of illegal motive simply by reason of the discharge. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

8. In the instant case, the alleged violation of Section 8(a)(1) is based entirely upon the alleged violation of Section 8(a)(3). General Counsel expressly disclaimed any allegation of independent violation of Section 8(a)(1). As is true of the Section 8(a)(5) charge (Board's Brief, p. 2, n. 1), in this particular case unless the employer, by adopting the policy of job tenure for replacements by means of additional seniority is *per se* guilty of violation of Section 8(a)(3), no violation of Section 8(a)(1) has been alleged or shown to exist.

Argument.

The second type of case, of which the Board says there are "many instances"⁹ is said to be that in which the employer's motive is "irrelevant because he has singled out union membership or activity and imposed coercion or restraints thereon which so impair employees' rights that, on balance, the action cannot be justified by its ultimate business purpose." (Board's Brief, p. 17).

In plain words, we judge this to mean that if the Board considers some behavior bad enough, it can declare it *per se* invalid and refuse to consider any defense.

The decision of the Supreme Court in *Republic Aviation Co. v. National Labor Relations Board*, 324 U.S. 793 (1945) is cited as authority for this proposition. That case involved wearing of union buttons in the plant, solicitation of members on plant property during non-working hours, and prohibition of distribution of literature in the company parking lot.

If the Board's contention is correct, any employer who did any of these things must *per se* be guilty of violating the law.

That has not been the case. Instead these rules and prohibitions have been considered case by case, and the

9. Only two cases are cited. *National Labor Relations Board v. Star Publishing Co.*, 97 F. 2d 465 (9th Cir.) was decided in 1938. The Ninth Circuit on three occasions since then has refused to apply this alleged rule. *Republic Aviation Co. v. National Labor Relations Board*, *infra*, and similar cases representing an abuse of expertise by the Board resulted in amendments to Sections 10(c) and 10(e) of the Act intended, as Congress said, " * * * to preclude such decisions as those in *N.L.R.B. v. Nevada Consol. Copper Corp.*, (316 U.S. 105)

Argument.

business needs and purposes, if genuine and substantial, have been recognized as proof of lawful motive.¹⁰

The Board's indiscriminate or *per se* application of its rule was rejected, and the Board required to examine the facts and circumstances, in *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). In that case, Mr. Justice Reed, speaking for the Court, referred to the Court's earlier ruling, saying:

" * * * No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793, 803. * * *" (Emphasis Supplied)

Thus, the Court has recognized that under *Republic Aviation* a legitimate business purpose justifies an action which, absent such a purpose, could be held violative of the Act.

The Board's attempt to place all labor cases into one or the other of two categories is both an oversimplification of the complex field of regulation of labor-management relations and an attempt by the Board to escape the duties imposed upon it by the law.

and in the *Wilson*, *Columbia Products*, *Union Pacific Stages*, *Hearst*, *Republic Aviation*, and *LeTourneau*, etc., cases * * *. Among other things, it was said: "The language also precludes the substitution of expertness for evidence in making decisions." House Conference Report No. 510, 80th Cong., 1st Sess., *Legislative History of the Labor Management Relations Act*, 1947 (U.S. Govt. Prtg. Office, 1948), Volume I, page 560.

10. See, e.g., *Tabin-Picker & Co.*, 50 N.L.R.B. 928 (1943); *North American Aviation, Inc.*, 56 N.L.R.B. 959; *Stuart F. Cooper Co.*, 136 N.L.R.B. No. 8 (March, 1962).

Argument.

The key to its attempted establishment of these two categories is found in the words "which so impair employee rights that, *on balance*, the action cannot be justified." (Emphasis Supplied) (Board's Brief, p. 17). In such cases the Board says motive is completely irrelevant, and the doing of the act *per se* condemns the actor.

The significance of this statement is that the Board has delegated to itself the authority to decide when it will or will not consider motivation or purpose relevant, which is the alleged "balancing" we have discussed.

Truly the categories of employer or union activities that might thus be absolutely prohibited would be extensive. A host of such activities which either interfere with some protected activity or encourage or discourage union membership readily comes to mind, but they have not yet been declared *per se* unlawful by the Board, or, if they have, the Courts have reversed the declaration.¹¹

11. A few examples are as follows: Discharge of union adherents, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Noritake Co., Inc.*, 139 N.L.R.B. No. 62 (Nov. 1, 1962); granting superseniority to union officers, *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949); replacement of economic strikers, *Mackay Radio & Telegraph Co. v. National Labor Relations Board*, *supra*; agreeing to preferential seniority for one group as opposed to another group, *National Labor Relations Board v. Wheland Co.*, 271 F. 2d 122 (6th Cir., 1959); lockouts, *Building Contractors Assn. of Rockford, Inc.*, 138 N.L.R.B. No. 143 (October 5, 1962); elimination of an Easter bonus for union workers while continuing it for non-union workers, *Speidel Corporation*, 120 N.L.R.B. 733 (1958); shutting down a plant, *National Labor Relations Board v. Lassing*, 284 F. 2d 781 (6th Cir., 1960) cert. den. 366 U.S. 909; *National Labor Relations Board v.*

Argument.

In support of its assumption to declare all additional seniority unlawful, the Board relies upon the decision in *Radio Officers v. National Labor Relations Board*, 347 U.S. 17 (1954) and the companion cases decided that same day, but this is a distortion of the holding in those cases. As Mr. Justice Douglas said in discussing *Radio Officers* in *Local 357, Teamsters Union v. National Labor Relations Board*, 365 U.S. 667 (1961):

"It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test."

It seems almost incomprehensible that the Board should read into this language authority to completely disregard the true purpose or real motive, but that is what it has done in this case.

The Board's decision in the instant case is not based upon any inference that the respondent's purpose or motive was to interfere with a protected activity or to encourage or discourage union membership. On the contrary, conceding a lawful motive, the Board says that it is completely irrelevant, and refuses to consider it.

As Circuit Judge Smith's opinion clearly shows, that was the basis for refusing enforcement. (Circuit Court Proceedings, pp. 17, 20, 21).

Rapid Bindery, Inc., 293 F. 2d 170 (2nd Cir., 1961); elimination of jobs in the bargaining unit, *Puerto Rico Gas and Coke Company*, 124 N.L.R.B. 489 (1959); *Waynesboro Knitting Co.*, 90 N.L.R.B. 113 (1950); subcontracting work, *Motoresearch Company and Kems Corporation*, 138 N.L.R.B. No. 145 (October 9, 1962); harassing strikes, *Insurance Agents International Union v. National Labor Relations Board*, 361 U.S. 477 (1960).

Argument.

The opinion in *Radio Officers* specifically affirms the rule that motivation is relevant in the following words:

"The relevance of the motivation of the employer has been consistently recognized under both 8(a)(3) and its predecessor. ***"

"That Congress intended the employer's purpose in discriminating to be controlling is clear."

The Court goes on to say that in cases where the foreseeable result is encouragement (or presumably discouragement) of union membership, the Board need not introduce "*independent* proof that encouragement of Union membership actually occurred", but that it was "eminently reasonable for the Board to infer encouragement of Union membership" from the facts on the record in that case. (Emphasis Supplied). The Court of Appeals in the instant case recognized the Board's right to draw inferences but not to disregard evidence rebutting such an inference. (Circuit Court Proceedings, p. 20, n. 6).

Neither *Radio Officers* nor any other case holds that no evidence may be submitted to rebut such an inference. On the contrary, in *Radio Officers*, Mr. Justice Frankfurter wrote a concurring opinion, in which Mr. Justice Burton and Mr. Justice Minton joined, summarizing his view of the effect of the Court's decision as follows:

"In sum, any inference that may be drawn from the employer's alleged discriminatory acts is just one element of evidence which may or may not be sufficient, without more, to show a violation. But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence

Argument.

*which may be adduced, and which the Board must take into consideration. * * * (Emphasis Supplied)*

Mr. Justice Black, joined by Mr. Justice Douglas, dissented from the opinion in *Gaynor*, saying:

"The plain and long accepted meaning of § 8 (a) (3) is that it forbids an employer to discriminate only when he does so *in order to* 'encourage or discourage' union membership. *Labor Board v. Waterman S.S. Co.*, 309 U.S. 206, 219. * * *

* * * * there was no finding that either employer's discrimination occurred *in order to* encourage union membership. For the reasons set out in my discussion of § 8(a)(3) in the *Gaynor* case, I think these findings fall short of showing an employer 'violation of § 8(a)(3).' * * *

We submit that the views of the dissenting Justices are consistent with justice, Congressional intent, and effective and impartial administration of the Act, and that the Board should not be permitted to draw an inference of unlawful motive simply because the Board considers that some act or tactic encourages or discourages union membership or activity.¹²

Evidentiary facts sufficient to support a conclusion of unlawful motive are not in short supply if such a motive exists, as witness literally thousands of cases in which the Board has made such findings on such facts.

12. Cf. *Sax v. National Labor Relations Board*, 171 F. 2d 769 (7th Cir., 1948).

Argument.

However, assuming that the majority opinion in *Radio Officers* means that an inference may be drawn from the naked fact that an act was done, certainly, as the concurring opinion makes clear, this inference may be bolstered or rebutted by other evidence, which the Board must take into consideration.

There is not one word in any of these three opinions to support the proposition that motive is irrelevant. Instead, they make it clear that unlawful motive is an indispensable element of the alleged violation.

More recently, Mr. Justice Harlan, in a concurring opinion in which Mr. Justice Stewart joined, discussed the Board's efforts to use *Radio Officers* as authority for a *per se* rule to outlaw any hiring hall that did not meet its tests, said:

"What in my view is wrong with the Board's position in these cases is that a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects. * * *"

Teamsters Local 357 v. N.L.R.B., 365 U.S. 667, 677-685 (1961).

The Board struggles to rationalize its theory that in cases where the foreseeable result is encouragement or discouragement motive or purpose is irrelevant.

Argument.

This is said (Board's Brief, p. 32) to be "consistent with the manifold expressions of courts and text writers asserting that the decisive question under Section 8(a)(3) is the 'real motive' for the employer's conduct."

The expression of just one of the text writers is worth noting.¹³ He said:

"The principle to be followed in the administration of Section 8(3) has never been in dispute. * * *

* * * * *

"* * * *The true purpose is the subject of investigation with full opportunity to show the facts.*"

The Board says its assertion that motive is irrelevant is consistent with these plain statements that it is controlling because " * * * further proof of a specific intent to encourage or discourage union membership is not necessary *after it appears that 'the employer intended to discriminate solely on the ground of such protected activity' or 'solely on union membership status'* * * *." (Board's Brief, p. 31). (Emphasis Supplied)

Of course, this begs the question, and does not meet the criticism by the Court of Appeals of the Board's *per se* theory.

This is no more than saying that as in cases in the Board's first category—say a discharge case—the Board need inquire no further if on substantial evidence in the record considered as a whole it finds that the employee was discharged solely because of his union membership or activity.

13. Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harvard Law Review 1, 20.

Argument.

However, the Court of Appeals pointed out, as the Board now tacitly admits, that the Board must first find as a fact that this was the employer's intent.

Such an intent, motive or purpose was vigorously denied by the respondent, and the evidence produced satisfied the Trial Examiner that the employer's sole purpose was lawful.

The Board, however, seeks not only to infer the intent to encourage or discourage, but to support this inference by the further inference, based on its own judgment of the seriousness of the act, that the employer intended to discriminate solely on the basis of the protected activity. It would, in short, infer the basis for the first inference.

If we grant the authority to draw the second inference, the Board now seeks to go further and say that, depending on its judgment, it will consider or ignore at its option evidence offered to show that it was *not* the employer's intent to discriminate solely, or even partly, on the basis of union activity or membership.

The Board's analogy (Board's Brief, p. 15) illustrates this inference on inference. The Board says that a man who breaks a window and takes a ring in order to feed his starving children is guilty of a crime, notwithstanding his motive. Presumably the Board would inflict the maximum penalty for this crime, regardless of desperate need. That is not the point, although we would like to think that a Court, being concerned with justice, would take it into account.

The point is that under the law, stealing is a crime. Unless granting additional seniority to replacements is

Argument.

per se a crime, which is the point at issue, inferring that the respondent intended to do what he did does not make it a crime. The suggestion that this is what the Courts mean by inference of motive or intent is unworthy of serious consideration.

The Board's whole argument in this case is that it must be impossible for the employer to have had any purpose or motive for granting additional seniority except to discriminate against strikers, because, according to the Board, that was the effect. The argument could be advanced as to every example we mentioned. It cannot stand in the face of proof to the contrary.

The fact is, as found by the Trial Examiner, the respondent's sole purpose in granting additional seniority was to obtain permanent replacements in order to operate his plant. This purpose is conceded to be lawful. Thus though it is clear that his "true purpose" and "real motive" have been proved by evidence to be lawful and not discriminatory, the Board would overcome this proof by an inference drawn from its own evaluation of the desirability of the conduct in question.

This drastic extension of the rule in *Radio Officers*, which is totally unnecessary to effective administration of the Act, would open the door to almost unlimited abuses which, as we have seen, may condemn either or both employer and union without any opportunity to present a defense.

The words of Mr. Justice Douglas in his dissent in *State of New York v. United States of America*, 342 U.S. 882 (1951) are prophetic. He said:

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"Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."

More recently in *Burlington Truck Lines, Inc. v. United States*, 31 U.S. L. Week 4023 (Nos. 27 and 28 decided December 3, 1962), Mr. Justice White said:

"The agency must make findings that support its decision, and those findings must be supported by substantial evidence."

This seems little enough to ask of a board of experts who have the power of economic life or death over employers and unions.

IV.

The facts in this particular case bring it within the ambit of National Labor Relations Board v. Mackay Radio & Telegraph Co.

If, as we urge, the respondent is entitled to be judged on the facts in its own case and not required to defend every case in which an employer may have granted so-called "superseniority", those facts must satisfy any reasonable man that its action was well within the rule established in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

Thus, the first requirement of *Mackay* is that the employer be guilty of no unfair labor practice. Absent *per se* illegality of its so-called "superseniority" policy,

Argument.

Erie Resistor was found guilty of no unfair labor practice.

Next, the strike must be an economic strike. The Board found: "The strike was concededly economic in its inception * * *." (R. 3a).

Then there must be a hiring of permanent replacements, who may be assured of job tenure. The Board so found.¹⁴

14. The Board's counsel calls these replacements, who until at least May 29 were found by the Board to be lawfully hired (R. 22a), "strike breakers" and says they were promised "superseniority". (Board's Brief, p. 9). This is a distortion of the Board's findings, and an attempt by use of inflammatory words to prejudge the respondent. When Congress considered the right of an employer to hire replacements, the distinction between a lawful replacement and a "strikebreaker" was stated as follows:

"The Board now says that an employer may replace an 'economic' striker, one who strikes for higher pay or other changes in working conditions. The bill writes this rule into the act, saying that a striker remains an 'employee' 'unless such individual has been replaced by a regular replacement'; and, at the end of the subsection, it defines a 'replacement' as being an individual who replaces a striker '*if the duration of his employment is not to be determined with reference to the existence or duration of such labor dispute.*' Thus 'strikebreakers' may not be regarded as 'replacements.' " (Emphasis Supplied)

House Report No. 245 on HR 3020, April 11, 1947, *Legislative History of the Labor Management Relations Act, 1947* (U.S. Govt. Prtg. Office, 1948), Volume I, page 202, at page 303.

Presumably because the principle of replacement of economic strikers was, and is, accepted by all, the final

Argument.

However, when the strike began roughly half the work force was on layoff due to a decline in business and operations, the great majority, about 400 out of 450, having no reasonable expectation that they would be recalled. (R. 5a, 36a, 70a).

If the replacements were to remain after the strike as promised, some arrangement had to be made for them other than seniority from the date of hire; otherwise, they would have to go to the foot of the long layoff list, in which case they would have no prospect of employment.

The employer then did what we submit was in itself evidence of good faith and absence of any intent to discriminate. As the Board found:

"In a bargaining session held May 11, Respondent informed the Union that it was promising replacements they would not be laid off as a result of settlement of the strike, and advised it that in order to implement this promise, it would have to accord the replacements some form of superseniority. Respondent offered to negotiate the details of a superseniority scheme for replacements." (R. 4a).

Thus on May 11, the first day replacements were hired and the problem thus became apparent, the respondent put the problem on the bargaining table for negotiation. (R. 4a).

draft did not contain this specific provision, but it is clear that Congress recognized that permanence of tenure was the distinguishing feature between bona fide replacements and strikebreakers. (Senate Debates, 93 Cong. Rec. 4320-4321, *Ibid*, pp. 1102-1103).

Argument.

Of course the Board calls this a proposal for "superseniority", perhaps because any arrangement that would permit the replacements to stay on after the strike necessarily would result in their stepping in ahead of those on layoff, and probably some strikers, for the business was hurt badly during the very first days of the strike¹⁵ and it seemed certain that the pre-strike level of operations would not again be attained.

The Court of Appeals more accurately states the fact, saying "The Company offered to consider any plan acceptable to the Union, but the offer was rejected." (Circuit Court Proceedings, p. 16).

The Board ignores the undisputed fact that the respondent did not insist upon superseniority for replacements. It insisted only that some arrangement—any arrangement—be made that would permit them to stay at work after the strike ended. (R. 150a, 156a, 225a-227a, 442a-443a, 146a-147a, 124a, 165a, 161a, 159a, 343a).

At five bargaining meetings between May 11 and May 28, the Company proposed several alternative plans, but, as the Board found: "The Union, however, remained adamant in its opposition to superseniority, contending that all strikers would have to be reinstated and the replacements terminated." (R. 5a).

The evidence shows, and the Trial Examiner found, that without some form of "superseniority" the em-

15. The biggest electronic component customer cancelled all its orders, the biggest plastics customer removed its tools and dies, and intense pressure was applied by the customers that remained. (R. 425a, 450a-451a).

Argument.

ployer could not get replacements to come to work. (R. 61a).

We reiterate that to this point the Board found nothing unlawful in respondent's conduct, which was certainly within the rule in *Mackay Radio*.

Then on May 27 the so-called 20-year plan was formulated, based on a projection of what the work force would be after the strike. (R. 5a, n. 2).

On May 28, respondent, according to the Board, "informed the Union that it had settled on the 20-year seniority plan. However, this plan was not publicized until June 10, and was claimed to be 'confidential' until then." (R. 6a).

Still the Board found nothing unlawful in respondent's conduct through May 28.

Then, while the Company treated the plan, which was really another proposal for bargaining, as confidential, the Union brought it up at a membership meeting on May 29, and broadcast it all over Erie over television. (R. 6a).

At this point, according to the Board, the strike became an unfair labor practice strike for the first time. (R. 21a-22a).

Although the Company, after four more fruitless meetings (General Counsel's Exhibit 2, R. 543a), finally announced on June 10 adoption of the plan it has proposed to the Union on May 28, it still offered to bargain on any alternative. As Judge Smith observed, "Notwithstanding the formulation of a preferential seniority policy, the Company expressed a willingness to consider

Argument.

any alternative plan proposed by the Union." (Circuit Court Proceedings, p. 16).

When the strike was over, the permanent replacements continued to work, and as many strikers as had not been replaced, and for whom there were jobs, were recalled. (R. 7a).

What this employer did is precisely what the Court in *Mackay Radio* indicated was permissible.

The only feature of this case that does not appear to be present in *Mackay Radio* is the employer's attempt to negotiate with the Union a solution to the problem that would confront them both at the end of the strike, when there would be more people than there would be jobs.

The seniority which the replacements or any other employees in the unit were to have was the subject of bargaining. While the respondent was admittedly flexible, offered to consider any plan, and proposed a number of solutions, the Union refused to bargain on the subject at all.

Faced with the Union's absolute refusal to recognize the replacements as employees, the respondent had to choose between discharging them at the end of the strike, thus dishonoring its lawful promise to them, or adopting as a matter of policy one of the seniority plans proposed to the Union.

The choice was not an easy one, but nevertheless respondent decided to honor its lawful promise to the replacements, while keeping open the door to negotiation that might settle the problem.

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Judge Smith states the applicable principle, announced in *Mackay Radio*, concisely and well, as follows:

"* * * We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy. * * *" (Circuit Court Proceedings, p. 21).

The Board, however, substitutes innuendo for findings of fact supported by evidence, and paints a picture of what it considers to be the evils of superseniority generally without reference to the facts of the case before the Court.

For example, the term "20 years additional service" is repeatedly used by the Board as though the Board had found that this was unreasonable under the circumstances, but it did not. The Board refused to consider any of the circumstances.

Had it done so, it would have found that the undisputed evidence shows that the respondent was at all times willing to negotiate on seniority for the replacements, and also that respondent underestimated the damaging effects of the strike on future business, so that the twenty years proposed on May 28 and finally adopted as a policy proved little or no protection against subsequent layoff.

Another repeated erroneous statement, and one that seems strange coming from experts in labor rela-

Argument.

tions, is that this seniority arrangement or any seniority arrangement is "permanent" Seniority is most certainly a subject for bargaining.¹⁶ It is no more "permanent" than any other subject for bargaining. *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949).

There is no suggestion in the record that respondent was then or is now unwilling to bargain on seniority, but only that it would not agree to the sole proposal made by the Union, which was that all the replacements have no seniority and be discharged.

The Board also mentions that some 178 employees withdrew from Union membership following the strike. (Board's Brief, p. 28). The Union embellishes this with a statement which has no support of any kind in the record, which was rejected by the Trial Examiner (R. 47a-48a), and which was not found by the Board (R. 16a), to wit, that "** * * at the instigation of the Re-*

16. The fact is that the Union on July 17, 1959 agreed with respondent as follows:

"The Company's replacement and job assurance policy to be resolved by the NLRB and the Federal Courts and to remain in effect pending final disposition." (Emphasis Supplied) (G.C. Ex. 27, R. 578a).

Other changes in seniority were agreed upon on July 17, 1959, including freezing of seniority for persons who transferred out of the bargaining unit (R. 303a-304a); revision of the operation of the seniority system (R. 306a, 308a); and superseniority for union officers (R. 317a, 318a). None of these other changes were challenged as being unlawful, probably because they were changes the Union wanted.

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spondent, 173 members withdrew from the Union * * *. (Emphasis Supplied) (Union's Brief, p. 19). This is simply not true.

The Company and the Union agreed upon a maintenance of membership clause with an escape period up to August 1. It is undisputed that the Company did no more than make applications for membership and withdrawal cards equally available and explained the maintenance of membership clause. (R. 47a). The Company did not suggest to anyone that he join, withdraw, or refuse to join the Union, nor was there even an allegation that it did so.

In this connection, however, we suggest that the mass picketing, violence, attacks on employees' homes, terrorism, threats and abuse of employees, which respondent attempted to prove but which evidence in large part was rejected (R. 454a-455a, 556a, 457a, 461a-462a, 470a-472a, 480a-482a, 484a-486a, 502a-504a, 510a-518a, 557a), may well have disenchanted more people with the Union than anything respondent did or could have done.

This evidence should have been admitted, for as the Court said in *N.L.R.B. v. Hart Cotton Mills*, 190 F. 2d 964, 975 (4th Cir., 1951):

"We do not mean to suggest by referring to the methods pursued in the effort to win the strike that unlawful or violent conduct on the part of employees on strike will condone unfair labor practices on the part of the employer. * * *

"Nevertheless the acts of an employer when confronted by such an emergency cannot be ap-

Argument.

praised without taking into account the whole situation. * * *

Corrections of all the omissions and erroneous statements of fact contained in the Board's Brief and the Union's Brief can hardly be attempted here, nor should we be obliged to do so at this stage of the proceedings.

Nevertheless, no case can be decided in a vacuum, and suggestions of unlawful motive or unreasonable conduct if unchallenged may be as prejudicial as though they were findings of fact based on substantial evidence.

Upon the evidence in the record considered as a whole, and the findings of the Trial Examiner, which the Board could not in good conscience reverse, respondent was guilty of no unfair labor practice, affirmatively proved a legitimate motive and pressing economic need for its actions, and did only what *Mackay Radio*, and every decision on the subject since that time, permitted it to do. On these facts and findings the complaint should have been dismissed, as recommended by the Trial Examiner. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951).

*Conclusion.***CONCLUSION**

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN C. BANE, JR.

JOHN G. WAYMAN

REED SMITH SHAW & MCCLAY

747 Union Trust Building

Pittsburgh, Pennsylvania

Counsel for Erie Resistor

Corporation

Of Counsel:

IRVING OLDS MURPHY

GIFFORD, GRAHAM, MACDONALD & ILLIG

615 Masonic Building

Erie, Pennsylvania

*Appendix—Statute Involved.***APPENDIX****Statute Involved**

The relevant provisions of the *National Labor Relations Act*, as amended (61 Stat. 136, 29 U.S.C. §151 et seq.), in addition to those contained in the Brief of the National Labor Relations Board, are as follows:

[SEC. 10(c)—REDUCTION OF TESTIMONY TO WRITING:
FINDINGS AND ORDERS OF BOARD]

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and *to take such affirmative action* including reinstatement of employees with or without back pay, *as will effectuate the policies of this Act: Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective

Appendix—Statute Involved.

of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * *

Appendix—Statute Involved.

[SEC. 10(e)—PETITION TO COURT FOR ENFORCEMENT OF ORDER; PROCEEDINGS; REVIEW OF JUDGMENT]

(e) The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the

Appendix—Statute Involved.

court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

SUPREME COURT, U. S.
No. 288

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1962

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

ERIE RESISTOR CORPORATION,

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE
WORKERS, LOCAL 613, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR RESPONDENT UNION

BENJAMIN C. SIGAL,

DAVID S. DAVIDSON,

WINN L. NEWMAN,

Attorneys for

*International Union of Electrical,
Radio and Machine Workers,
Local 613, AFL-CIO.*

1126 16th St., N.W.,
Washington 6, D.C.

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The Company has not denied that the strikers were engaged in protected concerted activity, nor has it denied that the strikers were restrained and interfered with in the exercise of their right to engage in such activity by the grant of preferential seniority to non-strikers (Bd. Br., pp. 13-19; Union Br. pp. 25-26; see also Co. Br. pp. 19-20).

The Company's only defense to the clear application of Section 8(a)(1) to the facts of this case is its contention that the question of violation of Section 8(a)(1) is not properly raised in this case (Co. Br. p. 35, n. 8). This contention is without merit.

The complaint alleges in separate paragraphs that the institution and implementation of the preferential seniority policy violated Section 8(a)(3) and Section 8(a)(1) of the Act (R. 529a-530a). The Board considered and held that this conduct violated both sections. (R. 12a-19a). While the Company asserts that counsel for the General Counsel at the hearing disclaimed any independent violation of Section 8(a)(1), he did not disclaim what the complaint alleged. He merely restated what the complaint itself disclosed,—that there was no conduct apart from that described in the complaint relating to the institution and implementation of preferential superseniority which was alleged as a separate violation of Section 8(a)(1) and which might independently establish anti-union motivation (R. 81a-82a). The fact that the Company's conduct also violated Section 8(a)(3) does not preclude the finding that its conduct violated Section 8(a)(1) when judged under that Section. On the basis of Section 8(a)(1) alone, the decision of the Board warrants affirmation.

The Company's argument with respect to Section 8(a)(3) requires little comment beyond that which already appears in the main briefs (Bd. Br. pp. 27-38; Union Br. pp. 14-25).

While the usage of the terms "intent", "motive", and "purpose" is frequently imprecise, there is a clear distinction between the state of mind or purpose to use a particular means to achieve a desired result, and the reason to desire that the result be achieved. *Hamill v. Maryland Casualty Co.*, 209 F. 2d 338, 341 (C.A. 10). Cf. *Pointer v. United States*, 151 U.S. 396. It is not the ultimate objective which is an element of the violation of Section 8(a)(3), *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 47, 44-45.¹ The Company seeks to ignore this distinction by ignoring also the text of Section 8(a)(3) while purporting to analyze it.

II. The Facts in this Case Support the Board's Decision

The Company asks that it be judged on the facts of its own case and not be required to defend cases other than its own (Co. Br. p. 46). But the Company distorts the facts of its case in attempting to bring this case within the *Mackay* decision, 304 U.S. 333. On the facts of its case, which the Board correctly viewed, it has been properly judged.

* The Company describes the preferential seniority arrangement as one which was necessary to permit replacements to remain upon termination of the strike (Co. Br. p. 48). Upon this description rests its entire analogy to *Mackay*. But this was not the effect of preferential seniority. Indeed, no change in the contract was necessary to permit the replacements to stay on after the strike.

As Company witness Fertone testified, without contradiction, under the seniority system which was not in dis-

¹ The Company's argument that the amendments to Sections 10(e) and 10(e) in 1947 preclude the inference of the necessary intent (Co. Br. p. 36, n. 9) was set to rest in the *Radio Officers'* opinion, 347 U.S., at 49-50.

pute, employees could exercise seniority only to claim vacant jobs at the end of the strike. As strikers could return only to unoccupied jobs, there was no possibility at the end of the strike that the replacements would be displaced by returning strikers or laid off employees. The additional seniority given non-strikers played no role in protecting the replacements from layoff or discharge at the end of the strike (R. 411a-415a).

There is thus no substance to the contention upon which the Company now rests its case that preferential seniority was needed to implement its assurance that employees would not be displaced at the end of the strike. Indeed, even if settled terms of the contract had not already protected the replacements against such displacement, all that would have been needed to effectuate this assurance was a simple provision that replacements would not be displaced by strikers or laid off employees upon conclusion of the strike. This is not what the Company sought and not what it insisted upon as a condition to the settlement of all other contract issues.

The preferential seniority upon which the Company insisted had an entirely different impact. After termination of the strike, and after the fulfillment of the assurance to the replacements that they would not be displaced upon settlement of the strike, preferential seniority came into play only when the replacements and those who had not struck were retained in preference to employees who had struck and were not replaced during the strike. Former strikers were then laid off in substantial numbers while non-strikers were retained on the basis of the additional seniority granted them because they worked during the strike.

The Company asserts that in any event it was willing to

negotiate with respect to any plan which would assure the replacements against displacement at the end of the strike, and argues therefore that its conduct was lawful under *Mackay Radio*. Assuming that the Company was willing to settle upon any plan which would implement that assurance, such willingness did not give it the right, when no such plan was negotiated, to insist upon a plan which went further and discriminated against strikers in the terms and conditions of their employment after their return to work.

In fact, the Company's negotiations were not conducted with such an open mind. From the outset, the Company made several specific proposals, none of which was designed to protect replacements against displacement at the end of the strike but all of which granted them preferential seniority after the end of the strike (Union Br., p. 4, and record references set forth therein). When, on May 28, the 20-year plan was unveiled to the Union, the Company had decided that this plan would be placed in effect unless an equivalent or better form of superseniority were agreed upon (R. 120a, 122a, 123a, 436a). From May 28 on, the Company made it clear that preferential seniority for non-strikers was something it had to have and that it would not abandon this demand even if the Union permitted it to rewrite the entire contract (R. 21a; 209a-211a).

Thus, the Company was willing to negotiate only with respect to the form superseniority would take, but all plans it considered had similar discriminatory consequences unrelated to assuring the replacements that they would not be displaced at the end of the strike. Indeed, as pointed out above, as no agreement other than the seniority provisions of the contract which were not in dispute was needed to assure replacements against displacement, the

Company hardly sought by its insistence upon superseniority to negotiate for what the contract already provided.²

Thus, the fact that superseniority was discussed at the bargaining table cannot conceal that from May 28 on, if not before, the Company insisted that nonstrikers be given a form of preferential seniority unrelated to their retention at the end of the strike, and having effect only in the event of an economic layoff at some time subsequent thereto. Retention of replacements at the end of the strike is what *Mackay* permits. Discrimination against strikers who are not replaced in favor of non-strikers, both replacements and others, in the terms and conditions of their employment, is what it prohibits.³

The fact that the preferential seniority upon which the Company insisted was not equivalent to the assurance given replacements that they would not be displaced at the end of the strike has implications beyond distinguishing it from permanent replacement sanctioned in *Mackay Radio*. While the Board found it unnecessary to decide whether it was necessary for the Company to grant preferential seniority to obtain strike replacements (R. 19a, n. 29),⁴ the disparity between preferential seniority and the assurance actually given replacements itself demonstrates that it was not necessary to grant preferential seniority to replacements to obtain them. For all that was necessary to implement this assurance was rejection of any proposal that replacements

² While the Union proposed reinstatement of all strikers at the end of the strike, preferential seniority was not needed to counter that proposal. Mere insistence that replacements not be displaced was sufficient to achieve the Company's object.

³ Since *Mackay* only permits assurances to replacements, nothing therein can be deemed to sanction either preferential seniority as an inducement to return to work to those who were permanent employees when the strike began, or preference to them after the strike was over.

⁴ The contrary finding of the Trial Examiner was not adopted by the Board (R. 3a).

be terminated at the end of the strike. As superseniority was unnecessary to implement the assurance given replacements, it could not have been necessary to induce the replacements to come to work.⁵ Many other facts in the record confirm this conclusion.⁶ The Company's plea to be judged on the facts, while it seeks to conceal the disparity between the assurance it gave to replacements and its grant of preferential seniority, impels us to point out that the facts indeed condemn the Company's conduct.⁷

III. The Board Properly Reached the Question of Balancing Interests and Properly Resolved that Question

The Company's assertion that the issue of balancing of conflicting interests was advanced for the first time in its brief to this Court is without foundation (Co. Br., p. 14). In its brief to the Trial Examiner and the Board, the Union urged from the outset that the defense of economic necessity be rejected because the employee rights to be pro-

⁵ See *California Date Growers Association*, 118 NLRB 246, at 249, where similar assurances were found insufficient to justify preferential seniority.

⁶ For example, there were 300 unprocessed job applications on file at the end of the strike (R. 6a; 207a, 394a); applications came in without solicitation shortly after the strike began (4a; 393a, 394a); nonunit and temporary employees reported for work regularly without any assurances (R. 5a; 395a, 396a); there was a critical labor surplus in the Erie area (R. 6a; 187a-189a, 584a); there was no evidence that the Company utilized superseniority to recruit replacements; Company representatives Ferrell and Shioleno, conceded that the Company could have replaced all strikers if it desired, and Ferrell stated that it proceeded slowly in replacing employees to preserve continuity of employment (R. 6a; 173a, 297a, 345a).

⁷ We will not take the time to rebut all the statements in the Company's brief which are either without foundation in the record or contrary to it, but do not thereby concede the accuracy of any statements in its brief which are not specifically challenged. Nor do we concede the relevance of unsupportable assertions, such as the Company's assertion that it is a small plant which has been singled out for prosecution. See *Giffin Wheel Co.*, 136 NLRB No. 144; Standard & Poor's Corporation Records, Vol. C.F., p. 5356 (New York, N.Y., 1962).

ected outweighed the employer's asserted economic justification in the statutory scheme. The Board's decision clearly accepted this contention (R. 12a-19a). In its brief to the Court of Appeals the Board stated "The real question, therefore, is one of accommodating the employer's right to operate his business to the employees' right to engage in activities protected and guaranteed by the Act." The Board proceeded to develop its balancing of interests rationale in detail (Board's Br. below, pp. 14, 22-23). Clearly the theory of this case may not now be rejected or shunted aside as a novel consideration.

The Company's brief offers little defense against the balance struck by the Board.⁸ This is not surprising. As the Board has observed, only in the rare case is an ultimate economic objective lacking in the commission of unfair labor practices (Bd. Br., p. 18). It is likely that most illegal acts aimed at breaking a strike, or indeed at thwarting any form of union activity, are motivated by the desire to avoid economic loss and often by the belief that economic survival is at stake. The balance struck by the Board in this case can be upset only by denying its discretion to protect effective exercise of the employee rights to strike, and subordinating the protection of the right to strike to the employer's economic interests whenever the right to strike is effectively exercised. As we have already demonstrated, and the Company has not attempted to refute, such a result would be

⁸ Indeed the Company appears to rely almost exclusively upon its contention that its ultimate economic objective precludes balancing of interests in this case. Compare Co. Br. p. 22, n. 5 with Union Br., p. 32, n. 7. If an ultimate economic objective precludes balancing, then it is immaterial whether it is a significant, insignificant or even unreasonable objective so long as it is the object of the employer's conduct. The Company's assertion that the Board's decision refutes its major premise rests on this approach and collapses of its own weight with that contention. (Co. Br., pp. 19-20). By the Company's own analysis, balancing is at the heart of the Board's approach. (Ibid.)

in conflict with the statutory scheme and the intent of Congress (Union Br. pp. 22-23; 33-36).²

CONCLUSION

For the reasons set forth above, and in the main briefs of the Board and the Union, the decision of the Court below should be reversed and the order of the Board enforced.

Respectfully submitted,

BENJAMIN C. SIGAL,

DAVID S. DAVIDSON,

WINN I. NEWMAN,

Attorneys for

International Union of Electrical,

Radio and Machine Workers,

Local 613, AFL-CIO.

1126 16th St., N.W.,

Washington 6, D.C.

(5592-1)

² The broadside attack upon the Board's decision as a "per se" decision is without substance (Co. Br., pp. 21-25). *N.L.R.B. v. Insurance Agents' International Union*, 361 U.S. 477, involves an entirely different standard under an entirely different section of the Act. Even under that section, certain conduct, without reference to more, justifies a finding that the Act has been violated, *N.L.R.B. v. Katz*, 369 U.S. 736; *N.L.R.B. v. Wooster Division of Borg-Warner*, 356 U.S. 342. The holding of the instant case is no more a *per se* holding than that in *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, which balanced the employer's interests against the employees' Section 7 rights to hold that an employer may always assure replacements that they will not be displaced upon conclusion of the strike without regard to whether it was in fact necessary to give such assurances to operate during the strike. Indeed, here the Board's holding is only that the asserted economic justification could not "sanction the *pervasive form of preferred treatment here utilized by the Employer*." (R. 19a, emphasis added).